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Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law

Advisory opinion of the International Court of Justice on the accordance with international law of the unilateral declaration of independence in respect of Kosovo

Note by the Secretary-General

Addendum

1. At the 22nd plenary meeting of its sixty-third session, on 8 October 2008, the General Assembly, by its resolution 63/3, in accordance with Article 96 of the Charter of the United Nations, decided to request the International Court of Justice, pursuant to Article 65 of its statute, to render an advisory opinion on the following question:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

2. On 22 July 2010, the International Court of Justice delivered its advisory opinion on the above question.

3. On 26 July 2010, I received the duly signed and sealed copy of this advisory opinion of the Court.

4. On 26 July 2010, I transmitted to the General Assembly the advisory opinion given by the International Court of Justice on 22 July 2010 in the case entitled *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (see A/64/881).

5. I hereby transmit to the General Assembly the individual opinions, separate opinions and declarations appended to that advisory opinion.

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[Original: English]

DECLARATION OF VICE-PRESIDENT TOMKA

The Court should have exercised its discretion and declined to respond to the General Assembly's request — The Security Council's silence cannot be interpreted as implying any tacit approval of the declaration — The General Assembly does not have "sufficient interest" in requesting this opinion — The Advisory Opinion is prejudicial to the exercise of the Security Council's powers — The conclusion of the Court has no basis in the facts relating to the adoption of the declaration of independence — Important Kosovo actors and United Nations officials equally considered that the Assembly of Kosovo authored the declaration of independence — The legal framework applicable in Kosovo — Final settlement to be determined by the agreement between the parties or by the Security Council, but not merely by one party.

1. The majority of the Court has decided to reply to the request of the General Assembly for the advisory opinion. It provided its answer albeit only after having "adjusted" the question. That "adjustment" was of critical importance to the answer given; in fact, it was outcome-determinative. As those in the majority admit, "[t]he identity of the authors of the declaration of independence . . . is a matter which is capable of affecting the answer to the question whether [the] declaration was in accordance with international law" (Advisory Opinion, paragraph 52). In my judicial conscience, although being fully aware of the "realities on the ground"[1], I am unable to join my colleagues in the majority in this "adjustment" exercise.

DISCRETION AND PROPRIETY

2. This is a case in which the Court should have exercised its discretion as to whether to reply to a question put to it. Article 65 of the Statute, providing that "[t]he Court *may* give an advisory opinion" (in French it reads: "La Cour *peut* donner un avis consultatif") leaves no doubt that the Court is under no legal obligation to comply with a request. The Court possesses such discretion in order to protect the integrity of its judicial function and its nature as a judicial organ.

3. To answer the question put to the Court requires it not only to interpret Security Council resolution 1244 but also to make a *determination* whether an act adopted by the institutions of Kosovo, which has been put under a régime of international territorial administration, is or is not in conformity with the legal framework applicable to and governing that régime, i.e., Security Council resolution 1244 and the measures adopted thereunder, in particular the Constitutional Framework.

4. The Security Council, which remains actively seised of matters relating to Kosovo, has made no such determination and its silence cannot be interpreted as implying the tacit approval of, or acquiescence with, the act adopted on 17 February 2008, in view of the disagreements on this issue publicly voiced by its

[1]These realities are succinctly described in the Report of Mr. Ahtisaari, the Special Envoy of the Secretary-General on Kosovo's future status (doc. S/2007/168). They led him, once his effort to achieve a negotiated settlement failed, to submit his recommendation: that Kosovo's status be independence, supervised by the international community. Despite his urging that the Security Council endorse his Settlement proposal, it received no such endorsement by the Council.

members, in particular, its permanent members[2]. These disagreements persist and have been reaffirmed in the course of this advisory proceeding, both in the written and oral submissions.

5. The request for an advisory opinion was addressed to the Court by the General Assembly. The Assembly did not deal with the situation in Kosovo when a proposal to request an advisory opinion was made by Serbia. A new item had to be included in the General Assembly's agenda. Now, when the majority's opinion is delivered, the Assembly is free to discuss it, but certainly as long as the Security Council remains actively seised of the situation in Kosovo and exercises its function with respect to it, Article 12, paragraph 1, of the Charter prevents the General Assembly from making any recommendation with regard to the status of Kosovo. I fail to see any "sufficient interest" for the Assembly in requesting the opinion and agree with the view of Judge Keith, expressed in his separate opinion, on this point.

6. Through the question put to it by the *General Assembly*, the Court has become immersed in the disagreements prevailing in the *Security Council* on this issue, the Council having been still actively seised of the matter but not requesting any advice from the Court. With the answer offered by the majority, the Court takes sides while it would have been judicially proper for it to refrain from doing so.

7. As the former President of this Court, the late Manfred Lachs, wisely observed in the case relating to the situation in which the Security Council had been actively exercising its powers, as in the present one,

> "it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony — though not, of course, in concert — and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, *without prejudicing the exercise of the other's powers*" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 27; emphasis added).

8. The majority's answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity *vel non* of the declaration with resolution 1244 and the international régime of territorial administration established thereunder.

9. Therefore, in my view, only if the Court were asked by the Security Council to provide its legal advice, would it have been proper for the Court to reply.

THE QUESTION

10. The question for the Court, approved by the General Assembly in its resolution 63/3, reads as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The question "is clearly formulated", and "narrow and specific" (Advisory Opinion, paragraph 51). There was, therefore, no need to "adjust" the question, if only for the outcome sought.

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[2]See statements by the Members of the Security Council at the meeting, held on 18 February 2008, convened some 24 hours upon the issuance of the declaration of independence (doc. S/PV.5839, *passim*).

11. The majority, in its opinion, comes to the conclusion that

> "taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (Advisory Opinion, paragraph 109).

12. This conclusion has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct. The majority's conclusion implies that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina: Serbia, when it proposed the question; other States which were present in the General Assembly when it adopted resolution 63/3; the Secretary-General of the United Nations and his Special Representative; and, most importantly, the Prime Minister of Kosovo when he introduced the text of declaration at the special session of the Assembly of Kosovo!

13. The Foreign Minister of Serbia addressed a letter, dated 15 August 2008, to the Secretary-General of the United Nations, requesting the inclusion in the agenda of the Sixty-third Session of the General Assembly of a supplementary item entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law". In the explanatory memorandum, attached to his letter, he opens with the following paragraph:

> "*The Provisional Institutions of Self-Government of Kosovo*, a province of the Republic of Serbia under United Nations administration, pursuant to United Nations Security Council resolution 1244 (1999), unilaterally declared independence on 17 February 2008." (A/63/195, Enclosure; emphasis added.)

14. The letter was issued as an official document by the United Nations Secretariat on 22 August 2008. The issue was considered and resolution 63/3 was adopted by the General Assembly on 8 October 2008. The Member States of the United Nations thus had some seven weeks to consider the Serbian request and its explanatory memorandum. None of the other 191 Member States took issue with the Serbian identification of "the Provisional Institutions of Self-Government of Kosovo" as those who adopted the declaration of independence on 17 February 2008.

15. On 1 October 2008 the Permanent Representative of the United Kingdom, which is well known for the highly competent and fine international legal service in its Foreign Office, wrote a letter to the President of the General Assembly (A/63/461). With reference to agenda item 71, "Request for an advisory opinion", and to the draft resolution submitted by Serbia (A/63/L.2), "[i]n order to assist in the consideration of this item, the United Kingdom . . . submit[ted] a note of issues . . ., raising a number of questions on which members of the General Assembly may wish to reflect". Nowhere in that Note of Issues is a doubt expressed that the declaration was adopted by the Provisional Institutions. Actually, the Note of Issues first points out that

> "[t]he agenda item proposed by Serbia requests an advisory opinion on the question whether 'the unilateral declaration of independence of Kosovo is in accordance with international law' and then contrasts it with the question formulated in the draft Resolution, whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law'".

The Note expresses the view that

> "[i]t would be useful to know whether Serbia is seeking to focus on a narrower question about the *competence of the Provisional Institutions of Self-Government of Kosovo*, and, if so, how that question relates to Kosovo's status at the present time" (A/63/461, p. 4, para. 7; emphasis added).

There is thus no doubt that the Provisional Institutions of Self-Government of Kosovo were, in October 2008, some eight months after the adoption of the declaration, considered by the United Kingdom as those who adopted the declaration. Otherwise there would have been no point in asking whether the request concerns "a narrower question about the competence of the Provisional Institutions".

16. The question to the Court was approved as contained in draft Resolution (A/63/L.2), i.e., specifically mentioning the Provisional Institutions of Self-Government. The draft was introduced in the General Assembly by the Minister of Foreign Affairs of Serbia. He expressly mentioned that "the *provisional institutions of self-government* . . . of Kosovo and Metohija unilaterally declared independence" (A/63/PV.22, p. 1; emphasis added). No delegation taking part in the debate contested that the declaration was adopted by the Provisional Institutions of Self-Government. To the contrary, the United Kingdom's Permanent Representative said that "Kosovo's *Assembly* declared Kosovo independent" (*ibid.*, p. 3; emphasis added). The United States delegate referred to "the declaration of independence of Kosovo *Provisional Institutions of Self-Governance*" (*ibid.*, p. 5; emphasis added). The Permanent Representative of France opened his statement with the following sentence: "On 17 February 2008, the *Assembly of Kosovo* declared the independence of the Republic of Kosovo." (*Ibid.*, p. 8; emphasis added.) Finally, the General Assembly itself, in the second preambular paragraph of its resolution 63/3, recalls "that on 17 February 2008 the *Provisional Institutions of Self-Government* of Kosovo declared independence from Serbia".

17. The Secretary-General of the United Nations announced the following to the Security Council, when it met on 18 February 2008 to consider the situation in Kosovo in light of the issuance of the declaration of independence a day earlier:

> "Yesterday, my Special Representative for Kosovo informed me that the *Assembly of* Kosovo's *Provisional Institutions of Self-Government* held a session during which *it* adopted a declaration of independence, which declares Kosovo an independent and sovereign State." (S/PV.5839, p. 2; emphasis added.)

He stated the same in his very first report on UNMIK, submitted to the Security Council after the declaration of independence was adopted, informing the Council that "[o]n 17 February, the *Assembly* of Kosovo held a session during which *it adopted* a 'declaration of independence', declaring Kosovo as an independent and sovereign State" (S/2008/211; p. 1, para. 3; emphasis added)[3].

18. Who could have better determined the capacity in which those who adopted the declaration acted at that critical moment in Kosovo's history than its Prime Minister, in his solemn statement introducing the text of the declaration and reading it to those assembled? He said:

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[3]The majority had to "accept[]" this statement of the Secretary-General, in his Report trying to minimize its relevance, stating that it was just "the normal periodic report on UNMIK activities . . . not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted" (Advisory Opinion, paragraph 108).

"Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested [] the President of the *Assembly*, Mr. Krasniqi[,] to call for a *special session* with two agenda items.

This invitation for a *special session* is extended *in accordance with the Kosovo Constitutional Framework*, whereby we present two items on the agenda:

1. Declaration of Independence for Kosovo, and

2. Presentation of Kosovo State symbols."[4]

The President of the Kosovo Assembly was also of the view that he was presiding over the Assembly meeting when he "invite[d] the Prime Minister of Kosovo, Mr. Hashim Thaçi, to provide justification for the request for the *special* and solemn *Assembly* session"[5].

19. The majority had, at the end of the day, to concede that the President of the Kosovo Assembly and the Prime Minister of Kosovo "made reference to the Assembly of Kosovo and the Constitutional Framework" (Advisory Opinion, paragraph 104), while maintaining its intellectual construct that the authors of the declaration "acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (*ibid.*, paragraph 109). The Members of the Assembly, are they not "representatives of the people of Kosovo"? The President of Kosovo, is he not the representative of the people of Kosovo? They met, as the Prime Minister stated, "in accordance with the Kosovo Constitutional Framework"; they thus wished to act in accordance with that framework and not outside of it, as the majority asserts.

20. Although the majority engaged itself in the search for "the identity of the authors of the declaration of independence"[6], finally "having established [their] identity" (Advisory Opinion, paragraph 110), no such search was needed, as their "identity" is well known and documented in the procès-verbal of the special plenary session of the Assembly of Kosovo[7]. Nor was there any need to search for "the capacity" in which those who adopted the declaration acted (Advisory Opinion, paragraph 109). The President of the Kosovo Assembly, who presided over its special session and conducted the vote on the declaration, announced the result in the following terms:

"I state that with all votes 'in favor' of the present members, *Members of the Assembly of Kosovo*, today, on February 17, 2008 *have expressed their will* and the will of the citizens of Kosovo, for Kosovo an independent, sovereign and democratic state."[8]

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[4]Written contribution of the Republic of Kosovo, 17 April 2009, Ann. 2 — Extraordinary session of the Assembly of Kosovo held on 17 February 2008 (Transcript, p. 228; emphasis added).

[5]*Ibid.*, p. 227; emphasis added.

[6]See the title of Chap. IV, Sec. B. 2 *(a)* of the Advisory Opinion.

[7]See Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence held on 17 February 2008, in: Written Contribution of the Republic of Kosovo, 17 April 2009, Ann. 2, pp. 238-245.

[8]*Ibid.*, p. 238; emphasis added.

Each of those who signed the declaration, in addition to the President of Kosovo, its Prime Minister and the President of its Assembly, was "invite[d]" to sign it in his/her capacity of either "the member of Kosovo Assembly" or "the member of Chairmanship" of the Assembly[9]. They added their signatures below the declaration as members of the Kosovo Assembly as *verbis expressis* confirmed on the original papyrus version of the declaration, in the Albanian language[10]. The assertion of the majority in the advisory opinion that "[n]owhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo" (paragraph 107) is thus plainly incorrect, not enhancing the credibility of the majority's intellectual construct.

21. The Assembly of Kosovo, consisting of its members, the President of Kosovo and its Government, headed by the Prime Minister, constituted, on 17 February 2008, the *Provisional Institutions of Self-Government*[11] of Kosovo, and they together issued the declaration. The question was therefore correctly formulated in the request of the General Assembly and there was no reason to "adjust" it and subsequently to modify the title itself of the case.

LEGAL FRAMEWORK APPLICABLE TO KOSOVO AT THE MOMENT OF ADOPTION OF THE DECLARATION

22. The international legal régime in Kosovo has been governed since 10 June 1999 by resolution 1244 (1999), adopted by the Security Council acting under Chapter VII of the Charter of the United Nations, and by the Constitutional Framework.

Under resolution 1244 Kosovo has been placed under an international territorial administration. As a result, although the Federal Republic of Yugoslavia remained the territorial sovereign, it ceased to exercise effective control in that territory[12].

23. Security Council resolution 1244 did not displace the Federal Republic of Yugoslavia's title to the territory in question. To the contrary, the resolution expressly states, in paragraph 10 of its preamble, that the Security Council reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2" of the said resolution. The preamble, an integral part of resolution 1244, is central to ascertaining the context in which the resolution was adopted and the intention of the Security Council when adopting it. The preamble thus has to be taken into account when interpreting the resolution.

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[9] *Ibid.*, pp. 239-245.

[10] See *ibid.*, pp. 207 and 209 (the text in Albanian indicates: "Deputetët e Kuvendit të Kosovës", meaning "Deputies of the Kosovo Assembly".

[11] See Chap. 9 of the Constitutional Framework for Provisional Self-Government. The Advisory Opinion confirms that the Constitutional Framework was in force on 17 February 2008 (paragraph 91).

[12] The Permanent Representative of the United Kingdom, during the debate of the Security Council on Kosovo, held on 18 February 2008, the day following the adoption of the declaration of independence by Kosovo, said: "At the heart of today's controversy is a resolution adopted at this table in June 1999. In that resolution, the Council took an unprecedented step: it effectively *deprived* Belgrade of the *exercise of authority* in Kosovo." (S/PV.5839, p. 12; emphasis added.)

24. By establishing an international territorial administration over Kosovo, which remained legally part of the FRY, the United Nations assumed its responsibility for this territory.

25. The Security Council, in its resolution 1244, decided that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2" (operative para. 1). Both annexes refer to the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.

26. When the Security Council authorized the Secretary-General to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo, under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia (operative para. 10), it decided that the main responsibilities of this international civil presence would include:

— promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (para. 11 *(a)*);

— organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections (para. 11 *(c)*);

— facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (para. 11*(e)*);

— in a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement (para. 11 *(g)*).

27. By deciding on the main responsibilities of the international civilian presence, the Security Council has not abdicated on its overall responsibility for the situation in Kosovo; it has remained actively seised of the matter (para. 21 of resolution 1244). The role of the Security Council in respect of the final settlement issue has been preserved. The Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, which supported the recommendation of the Secretary-General to the Security Council to launch a process to determine the future status of Kosovo in accordance with Security Council resolution 1244, are telling. They confirm that "[t]he Security Council will remain actively seized of the matter. *The final decision on the status of Kosovo should be endorsed by the Security Council*"[13].

28. The notion of a "final settlement" cannot mean anything else than the resolution of the dispute between the parties (i.e., the Belgrade authorities and the Pristina authorities), either by an agreement reached between them or by a decision of an organ having competence to do so. But the notion of a settlement is clearly incompatible with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other.

It suffices to mention a few statements made by several States — particularly involved in Kosovo-related issues — in the Security Council.

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[13] In French, "*Le Conseil de sécurité* demeurera activement saisi de la question et ***devra*** *approuver la décision finale sur le statut du Kosovo*"; see letter of 10 November 2005 addressed to the Secretary-General by the President of the Security Council, S/2005/709, annex; emphasis added.

The United Kingdom condemned

> "unilateral statements on Kosovo's final status from either side. We will not recognize any move to establish political arrangements for the whole or part of Kosovo, either unilaterally or in any arrangement that does not have the backing of the international community." (S/PV.4742, p. 16, United Kingdom.)

A few months later, the same government stated in the Security Council that "[u]nilateral statements on status by any side seem to the United Kingdom to be totally unacceptable" (S/PV.5017, p. 21). The French government stated in 2003 that "[n]o progress can be achieved in Kosovo on the basis of unilateral action that is contrary to resolution 1244 (1999) or that flouts the authority of UNMIK and KFOR" (S/PV.4770, p. 5). The German Permanent Representative was unequivocal when he stated in 2003:

> "The question of Kosovo's final status will be addressed at the appropriate time and through the appropriate process. *Only the Security Council* has the power to assess the implementation of resolution 1244 (1999), and it *has the final word in settling the status issue*. No unilateral move or arrangement intended to predetermine Kosovo's status — either for the whole or for parts of Kosovo — can be accepted." (S/PV.4770, pp. 13-14; emphasis added.)

A few weeks later, the same government expressed its view that "[c]oncerning the future status of Kosovo, the parties have to understand that no unilateral act can change the status of Kosovo as laid down in Security Council resolution 1244 (1999)" (S/PV.4809).

29. The negotiations on determining Kosovo's future status, led by the Special Envoy of the Secretary-General, produced no agreement. The Special Envoy reported that "[t]hroughout the process and on numerous occasions, both parties have reaffirmed their *categorical*, diametrically opposed positions: Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept *nothing short of independence*"[14]. One may ask whether the parties negotiated in good faith because, as this Court observed, negotiating in good faith means that

> "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation . . .; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85; recalled in *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 141, and in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, para. 146).

[14]Report of the Special Envoy of the Secretary-General on Kosovo's future status, doc. S/2007/168, p. 2, para. 2; emphasis added.

30. The Special Envoy, being himself convinced that "reintegration into Serbia is not a viable option" and that "continued international administration is not sustainable", concluded that "independence with international supervision is the only viable option"[15]. He therefore submitted "*[his]* Settlement proposal" and "urge[d] the Security Council to endorse" it[16].

31. The Ahtisaari Settlement proposal was not endorsed by the Security Council, the only United Nations organ competent to do it. Having been divided on the Kosovo final status issue, the Security Council was circumvented, again. The UK Permanent Representative openly stated in the General Assembly that "*in coordination with many of the countries most closely involved in stabilizing the Balkans*, Kosovo's Assembly declared Kosovo independent on 17 February 2008" (United Nations doc. A/63/PV.22, p. 3; emphasis added). The Kosovo Declaration of Independence has been a way to put, to the extent possible, into practice the unendorsed Ahtisaari plan[17].

32. The declaration of independence was adopted by the Provisional Institutions of Self-Government, "in coordination with many of the countries most closely involved in stabilizing the Balkans"[18] at the moment when the Constitutional Framework was applicable, as confirmed by the Advisory Opinion (paragraph 91). Under the Constitutional Framework, external relations were the exclusive prerogative of the Special Representative (Advisory Opinion, paragraph 106).

On previous occasions the Special Representative has not hesitated, in the exercise of his supervisory role, to declare null and void a measure of one of the Provisional Institutions which he considered to be beyond that Institution's powers *(ultra vires)*. Thus, on 23 May 2002, the Special Representative of the Secretary-General declared "null and void" a resolution adopted by the Assembly of Kosovo seeking to challenge the border agreement signed in February 2001 between the FRY and the former Yugoslav Republic of Macedonia. On 7 November 2002, the Assembly of Kosovo adopted a resolution in reaction to a draft Constitutional Charter of Serbia and Montenegro (United Nations dossier No. 186). On the same day, the Special Representative of the Secretary-General declared this resolution to have "no legal effect" (United

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[15]Doc. S/2007/168, pp. 3 and 4. It is to be noted why, in his view, reintegration was not a viable option:

"For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia — however notional such autonomy may be — is simply not tenable" (p. 3, para. 7). The Report mischaracterizes the adoption of resolution 1244 as unanimous (para. 15).

[16]*Ibid.*, p. 5, para. 16.

[17]As one author who "acted as adviser to Kosovo in many, if not most, of the various peace processes and negotiations" wrote:

"The Declaration had been drafted in conjunction with, and checked by, key governments. It was phrased in a way as to have important legal implications for Kosovo. Employing the international legal notion of a 'unilateral declaration', it created legal obligations *erga omnes*. These are legal obligations that all other states are entitled to rely on and of which they can demand performance. In this sense, an attempt was made to replace the binding nature of a Chapter VII resolution of the Security Council imposing the limitations on Kosovo's sovereignty foreseen in the Ahtisaari plan with a self-imposed limitation of sovereignty." (Marc Weller, *Contested Statehood, Kosovo's Struggle for Independence*, Oxford University Press, 2009, pp. viii and 231.)

[18]That co-ordination, acknowledged by the United Kingdom Permanent Representative (A/63/PV.22, p. 3), is demonstrated by the (almost) immediate recognition of Kosovo's independence by those States.

Nations dossier No. 187). Moreover, in February 2003, the Assembly of Kosovo was preparing a "Declaration on Kosova—A Sovereign and Independent State" which, *inter alia*, would have stated that "Kosova is declared a democratic, independent and sovereign state" (United Nations dossier No. 188, 3 February 2003, para. 1). The Principal Deputy Special Representative of the Secretary-General, on behalf of the Special Representative of the Secretary-General, informed the President of the Assembly of Kosovo that the formal consideration of that matter by the Assembly "would be contrary to United Nations Security Council resolution 1244 (1999), the Constitutional Framework for Provisional Self-Government in Kosovo and to the Provisional Rules of Procedure of the Assembly". He further suggested that it would constitute "[a]ction . . . [of the Assembly of Kosovo] beyond the scope of its competencies" (United Nations dossier No. 189, 7 February 2003). In a similar vein, in November 2005, the Assembly of Kosovo contemplated a declaration of independence, but the Special Representative of the Secretary-General indicated that such a declaration "would be in contravention to the UN Security Council resolution [1244] . . . and it therefore will not be with any legal effect" (United Nations Interim Administration of Kosovo, Press Briefing Notes, 16 November 2005, pp. 4 and 5).

33. The above facts demonstrate that the Special Representative of the Secretary-General, entrusted by the United Nations with the interim administration of Kosovo, qualified a number of acts of the Assembly of Kosovo between 2002 and 2005 as being incompatible with the Constitutional Framework and, consequently, with Security Council resolution 1244. These acts, whether they sought directly to declare the independence of Kosovo or whether they fell short of it, were deemed to be "beyond the scope of its [i.e., the Assembly's] competencies" (United Nations dossier No. 189, 7 February 2003), in other words *ultra vires*.

34. The majority briefly mentions the above acts which were beyond the competencies of the Provisional Institutions of Self-Government under the Constitutional Framework (Advisory Opinion, paragraph 108). It attaches "some significance" to "[t]he silence of the Special Representative of the Secretary-General in the face of the declaration of independence on 17 February 2008" when it takes the view that this silence "suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible" *(ibid.)*.

But the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.

One is left with the impression that the Special Representative remained silent this time as he knew well the effort to implement, to the extent possible, the unendorsed Ahtisaari plan through the declaration adopted by Kosovo Assembly "in coordination with many of the countries most closely involved in stabilizing the Balkans".

35. The Court, as the principal judicial organ of the United Nations (Article 92 of the Charter), is supposed to uphold the respect for the rules and mechanisms set in the Charter and the decisions adopted thereunder. The legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and realities in Kosovo. The majority deemed preferable to take into account these political developments and realities[19], rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

(Signed) Peter TOMKA.

[19] "The declaration of independence of 17 February 2008 *must* be considered within the *factual context* which led to its adoption" (Advisory Opinion, see paragraph 57; emphasis added), as if this factual context was determinative in drawing legal conclusions. Similarly, the majority states that "the declaration of independence must be seen *in its larger context*, taking into account the events preceding its adoption, notably relating to the so-called 'final status process' (Advisory Opinion, paragraph 104; emphasis added), as if such context transformed the Assembly as one of the Provisional Institutions into something else.

[Original: English]

DISSENTING OPINION OF JUDGE KOROMA

The unilateral declaration of independence of 17 February 2008 unlawful for failure to comply with laid down legal principles — In exercising its advisory jurisdiction, the Court may only reformulate the question posed so as to make it more closely correspond to the intent of the institution requesting the advisory opinion — The Court's conclusion that the declaration of independence was made by a body other than the Provisional Institutions of Self-Government of Kosovo is legally untenable because it is based on the Court's perceived intent of those authors — Security Council resolution 1244 (1999) constitutes the lex specialis *to be applied in the present case — The declaration of independence contravenes resolution 1244 (1999), which calls for a negotiated settlement and for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia — The declaration of independence contravenes resolution 1244 (1999) because it is an attempt to bring to an end the international presence in Kosovo established by that resolution — The declaration of independence violated the Constitutional Framework and UNMIK regulations — The declaration of independence violated the principle of respect for the sovereignty and territorial integrity of States — The Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.*

1. I have voted in favour of the decision to accede to the request for an Advisory Opinion, but I unfortunately cannot concur in the finding that the "declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law", in view of the following.

2. The unilateral declaration of independence of 17 February 2008 was not intended to be without effect. It was unlawful and invalid. It failed to comply with laid down rules. It was the beginning of a *process* aimed at separating Kosovo from the State to which it belongs and creating a new State. Taking into account the factual circumstances surrounding the question put to the Court by the General Assembly, such an action violates Security Council resolution 1244 (1999) and general international law.

3. Although the Court in exercising its advisory jurisdiction is entitled to reformulate or interpret a question put to it, it is not free to replace the question asked of it with its own question and then proceed to answer that question, which is what the Court has done in this case, even though it states that it sees no reason to reformulate the question. As the Court states in paragraph 50 of the Advisory Opinion, its power to reformulate a request for an advisory opinion has been limited to three areas. First, the Court notes that in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion*, its predecessor, the Permanent Court of International Justice, departed from the language of the question put to it because the wording did not adequately state what the Court believed to be the intended question (Advisory Opinion, paragraph 50, citing *1928, P.C.I.J., Series B, No. 16*). Second, the Court points out that in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, the request was reformulated because it did not reflect the "legal questions really in issue" (*ibid.*, citing *I.C.J. Reports 1980*, p. 89, para. 35). This involved only slightly broadening the question but not changing the meaning from what had been intended. Finally, the Court observes that in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, it clarified a question considered unclear or vague (*ibid.*, citing *I.C.J. Reports 1982*, p. 348, para. 46). In all of these cases, the Court reformulated the question in an effort to make that question more closely correspond to the intent of the

institution requesting the advisory opinion. Never before has it reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption. The purpose of the question posed by the General Assembly is to enlighten the Assembly as to how to proceed in the light of the unilateral declaration of independence, and the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo. The Court does not have the power to reformulate the question — implicitly or explicitly — to such an extent that it answers a question about an entity other than the Provisional Institutions of Self-Government of Kosovo.

4. Moreover, the Court's conclusion that the declaration of independence of 17 February 2008 was made by a body other than the Provisional Institutions of Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court's perceived intent of those authors. International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.

5. It is also question-begging to identify the authors of the unilateral declaration of independence on the basis of their perceived intent, for it predetermines the very answer the Court is trying to develop: there can be no question that the authors wish to be perceived as the legitimate, democratically elected leaders of the newly-independent Kosovo, but their subjective intent does not make it so. Relying on such intent leads to absurd results, as any given group — secessionists, insurgents — could circumvent international norms specifically targeting them by claiming to have reorganized themselves under another name. Under an intent-oriented approach, such groups merely have to show that they intended to be someone else when carrying out a given act, and that act would no longer be subject to international law specifically developed to prevent it.

6. In the case before the Court, it should be recalled that the Special Representative of the Secretary-General had previously described such acts as being incompatible with the Constitutional Framework, on the grounds that they were deemed to be "beyond the scope of the Assembly's competence" and therefore outside its powers, in particular when that body took initiatives to promote the independence of Kosovo (United Nations dossier No. 189, 7 February 2003). In the face of this previous invalidation, the authors of the unilateral declaration of independence have claimed to have made their declaration of independence outside the framework of the Provisional Institutions of Self-Government.

7. As the Court has recognized in paragraph 97 of its Advisory Opinion, resolution 1244 (1999) and UNMIK regulation 1999/1 constitute the legal order in force at that time in the territory of Kosovo. Kosovo was not a legal vacuum. Any act, such as the unilateral declaration of independence of 17 February 2008, adopted in violation of resolution 1244 (1999) and UNMIK regulation 1999/1, will therefore not be in accordance with international law.

8. International law is not created by non-State entities acting on their own. It is created with the assent of States. Rather than reaching a conclusion on the identity of the authors of the unilateral declaration of independence based on their subjective intent, the Court should have looked to the intent of States and, in particular in this case, the intent of the Security Council in resolution 1244 (1999), which upholds the territorial integrity of the Federal Republic of Yugoslavia (Serbia).

9. In so far as the Advisory Opinion has not responded to the question posed by the General Assembly, I will now give my views on the question from the perspective of international law. Principally, my view is that resolution 1244 (1999), together with general international law, in particular the principle of the territorial integrity of States, does not allow for the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, and that that declaration of independence is therefore not in accordance with international law.

10. In the question that it has submitted to the Court, the General Assembly recognizes that resolution 1244 (1999) constitutes the legal basis for the creation of the Provisional Institutions of Self-Government of Kosovo. It is therefore obvious that the question before the Court is accordingly predicated on resolution 1244 (1999). That resolution was adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations and is thus binding pursuant to Article 25 of the Charter. It remains the legal basis of the régime governing Kosovo. Thus, when asked to determine the legal validity of the unilateral declaration of independence of 17 February 2008, this Court has, first and foremost, to interpret and to apply resolution 1244 (1999), both as international law and as the *lex specialis*, to the matter before it. Only after this must the Court consider the other mandatory rules of international law, in particular, the principle of the sovereignty and territorial integrity of a State, in this case the Federal Republic of Yugoslavia (Serbia).

11. Therefore, what is primarily at stake in this case is the proper interpretation and application of Security Council resolution 1244 (1999). As explained in detail below, the declaration of independence is unlawful under Security Council resolution 1244 (1999) for several reasons. First, according to the material before the Court, the declaration of independence was adopted by the Assembly of Kosovo as part of the Provisional Institutions of Self-Government. It was endorsed as such by the President and Prime Minister of Kosovo. Accordingly, it is subject to resolution 1244 (1999). Secondly, that resolution calls for a negotiated settlement, meaning the agreement of all the parties concerned with regard to the final status of Kosovo, which the authors of the declaration of independence have circumvented. Thirdly, the declaration of independence violates the provision of that resolution calling for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia and the autonomy of Kosovo. Additionally, the unilateral declaration of independence is an attempt to bring to an end the international presence in Kosovo established by Security Council resolution 1244 (1999), a result which could only be effected by the Security Council itself.

12. In order to apply Security Council resolution 1244 (1999) to the facts at issue in the question put by the General Assembly, the Court must interpret that resolution. In paragraph 117 of the Advisory Opinion, the Court recalled its statement in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* that when interpreting Security Council resolutions,

> "The language of a resolution . . . should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the

> resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (*Ibid., Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

13. In this regard, resolution 1244 (1999) reaffirms "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2" (United Nations, *Official Records of the Security Council*, 4011th meeting, S/RES/1244 (1999), p. 2). It further provides in operative paragraph 1 that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and . . . 2" *(ibid.)*. Both of these annexes provide that the political process must take "full account" (*ibid.*, p. 5) of the "principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region" *(ibid.)*. Moreover, in operative paragraphs 11 *(a)* and *(e)* of resolution 1244 (1999), reference is made to the Rambouillet accords. These accords also affirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. In the Preamble of the accords, the commitment to the Helsinki Final Act is reaffirmed, as is the commitment to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" (United Nations, *Official Records of the Security Council*, doc. S/1999/648, p. 3). Chapter 1 of the accords states that institutions of democratic self-government in Kosovo should be "grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia" *(ibid.*, p. 9*)*. Whether these provisions are considered separately or together, it is self-evident that resolution 1244 (1999) does not provide for the unilateral secession of Kosovo from the Federal Republic of Yugoslavia without the latter's consent. On the contrary, the resolution reaffirms the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, of which Kosovo is a component part. Moreover, the resolution provides for "substantial autonomy [for the people of Kosovo] *within* the Federal Republic of Yugoslavia" (United Nations, *Official Records of the Security Council*, 4011th meeting, S/RES/1244 (1999), para. 10; emphasis added). In other words, it was intended that Kosovo enjoy substantial autonomy and self-government during the international civil presence but that it remain an integral part of the Federal Republic of Yugoslavia.

14. The international civil presence called for in paragraph 11 of resolution 1244 (1999) was established in Kosovo with the "agreement" of the Federal Republic of Yugoslavia (Serbia) as sovereign over its entire territory, including Kosovo. This position is reflected in both the Preamble and the operative paragraphs of the resolution. In the Preamble, the Security Council:

> "*Welcom[ed]* the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcom[ed] also the *acceptance* by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the *Federal Republic of Yugoslavia's agreement to* that paper." (Emphasis added.)

In operative paragraph 1, the Security Council decided: "that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2". And in operative paragraph 2, the Security Council: "*[w]elcome[d] the acceptance* by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1" (emphasis added). Thus, according to resolution 1244 (1999), the Security Council acknowledges and recognizes Kosovo to be part of the territory of the Federal Republic of Yugoslavia and confirms that the establishment of the international civil presence there was with the agreement of the Federal Republic of Yugoslavia. Kosovo cannot be declared independent by a unilateral declaration while the international civil presence continues to exist and operate in the province. The resolution does not grant the international civil presence the right to alter or terminate the Federal Republic of Yugoslavia's sovereignty over its territory of

Kosovo, nor does it envisage the transfer of that sovereignty to any of the Provisional Institutions of Self-Government of Kosovo created by the international presence. To state this obvious fact in very clear terms, UNMIK and the Provisional Institutions of Self-Government of Kosovo were created by resolution 1244 (1999) with the express agreement of the Government of the Federal Republic of Yugoslavia. As subsidiary bodies of the Security Council, they possess limited authority derived from and circumscribed by resolution 1244 (1999). No power is vested in any of those bodies to determine the final status of Kosovo, nor do any of them have the power to create other bodies which would have such a power. Accordingly, when the Assembly of the Provisional Institutions of Self-Government of Kosovo purported to declare independence on 17 February 2008, they attempted to carry out an act which exceeded their competence. As such, the declaration is a *nullity*, an unlawful act that violates express provisions of Security Council resolution 1244 (1999). It is *ex injuria non oritur jus*.

15. That the unilateral declaration of independence by one of the entities of the Provisional Institutions of Self-Government of Kosovo contravenes both the text and spirit of resolution 1244 (1999) is also evident from operative paragraph 10 of the resolution, providing for the establishment of "an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy *within* the Federal Republic of Yugoslavia" (emphasis added). The use of the word "within" is a further recognition of the sovereignty of the Federal Republic of Yugoslavia over its territory of Kosovo and does not allow for the alteration of the territorial extent of the Federal Republic of Yugoslavia (Serbia).

16. Nor is the unilateral declaration of independence consistent with operative paragraph 11 of resolution 1244 (1999), which stipulates, *inter alia*, that the Security Council:

> "*Decides* that the main responsibilities of the international civil presence will include:
>
> *(a)* promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)".

The reference to a future "settlement" of the conflict, in my view, excludes the making of the unilateral declaration of independence. By definition, "settlement" in this context contemplates a resolution brought about by negotiation. This interpretation of resolution 1244 (1999) is supported by the positions taken by various States. For instance, France observed in the Security Council that:

> "the *Assembly* in particular must renounce those initiatives that are contrary to resolution 1244 (1999) or the Constitutional Framework . . . No progress can be achieved in Kosovo on the basis of *unilateral action* that is contrary to resolution 1244 (1999)." (United Nations, *Official Records of the Security Council*, Fifty-eighth year, 4770th Meeting, doc. S/PV.4770, p. 5; emphasis added.)

The Italian Government, on behalf of the European Union, stated that resolution 1244 (1999) was the "cornerstone of the international community's commitment to Kosovo" and it "urge[d] all concerned in Kosovo and in the region to cooperate in a constructive manner . . . on fully implementing resolution 1244 (1999) while refraining from *unilateral acts* and *statements* . . ." (United Nations, *Official Records of the Security Council*, Fifty-eighth year, 4823rd Meeting, doc. S/PV.4823, p. 15; emphasis added). The Contact Group, made up of the European Union, the Russian Federation and the United States, produced Guiding principles for a settlement of the status of Kosovo according to which "Any solution that is *unilateral* . . . would be unacceptable. There will be no *changes in the current territory of Kosovo* . . . The territorial integrity and

internal stability of regional neighbours will be fully respected." (United Nations, *Official Records of the Security Council*, doc. S/2005/709, p. 3; emphasis added.)

17. Finally, it should be recalled that in paragraph 91 of the Opinion, the Court holds that resolution 1244 (1999) is still in force and the Security Council has taken no steps whatsoever to rescind it. The status of that resolution cannot be changed unilaterally.

18. In the light of the foregoing, the conclusion is therefore inescapable that resolution 1244 (1999) does not allow for a unilateral declaration of independence or for the secession of Kosovo from the Federal Republic of Yugoslavia (Serbia) without the latter's consent.

19. In addition to resolution 1244 (1999), the Court has considered whether the unilateral declaration of independence has violated certain derivative law promulgated pursuant to it, notably the Constitutional Framework and other UNMIK regulations. It concludes that the declaration of independence did not violate the Constitutional Framework because its authors were not the Provisional Institutions of Self-Government of Kosovo and thus not bound by that Framework. The jurisprudence of the Court is clear that if an organ which has been attributed a limited number of competences transgresses those competences, its acts would be *ultra vires* (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 82; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 14). However, the majority opinion avoids this result by a kind of judicial sleight-of-hand, reaching a hasty conclusion that the "authors" of the unilateral declaration of independence were not acting as the Provisional Institutions of Self-Government of Kosovo but rather as the direct representatives of the Kosovo people and were thus not subject to the Constitutional Framework and UNMIK regulations. That conclusion simply cannot be correct, since the unilateral declaration of independence was adopted in the context of resolution 1244 (1999) and the Court has acknowledged that the question posed by the General Assembly is a legal question and that resolution 1244 (1999) is the *lex specialis* and applicable in this case.

20. In addition to examining resolution 1244 (1999) and the law promulgated pursuant to it, the Court, in considering the question put before it by the General Assembly, had to apply the rules and principles of general international law. In this regard, it must first be emphasized that it is a misconception to say, as the majority opinion does, that international law does not authorize or prohibit the unilateral declaration of independence. That statement only makes sense when made in the abstract about declarations of independence in general (see, e.g., the Advisory Opinion of the Supreme Court of Canada, reaching such a conclusion in the abstract with respect to secession in international law, *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada*, 1998, S.C.R., Vol. 2, p. 217, para. 112), not with regard to a specific unilateral declaration of independence which took place in a specific factual and legal context against which its accordance with international law can be judged. The question put before the Court is specific and well defined. It is not a hypothetical question. It is a legal question requiring a legal response. Since the Court, according to its Statute, is under an obligation to apply the rules and principles of international law even when rendering advisory opinions, it should have applied them in this case. Had it done so — instead of avoiding the question by reference to a general statement that international law does not authorize or prohibit declarations of independence, which does not answer the question posed by the General Assembly — it would have had to conclude, as discussed below, that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo amounted to secession and was not in accordance with international law. A unilateral secession of a territory from an existing State without its consent, as in this case under consideration, is a matter of international law.

21. The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain. The principle of respect for territorial integrity is enshrined in the Charter of the United Nations and other international instruments. Article 2, paragraph 4, of the Charter of the United Nations provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

The unilateral declaration of independence involves a claim to a territory which is part of the Federal Republic of Yugoslavia (Serbia). Attempting to dismember or amputate part of the territory of a State, in this case the Federal Republic of Yugoslavia (Serbia), by dint of the unilateral declaration of independence of 17 February 2008, is neither in conformity with international law nor with the principles of the Charter of the United Nations, nor with resolution 1244 (1999).

The principle of respect for territorial integrity is also reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, according to which:

> "any attempt aimed at the partial or total disruption of the national unity and *territorial integrity of a State or country or at its political independence* is incompatible with the purposes and principles of the Charter" (United Nations, *Official Records of the General Assembly*, Twenty-fifth Session, resolution 2625 (XXV) of 24 October 1970; emphasis added).

The Declaration further stipulates that "[t]he territorial integrity and political independence of the State are inviolable".

22. Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent. According to the above-mentioned Declaration, "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country". The Declaration further emphasizes that

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging *any action* which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." (Emphasis added.)

The Declaration thus leaves no doubt that the principles of the sovereignty and territorial integrity of States prevail over the principle of self-determination.

23. According to the finding made by the Supreme Court of Canada, which has already considered a matter similar to the one before the Court, "international law does not specifically grant component parts of sovereign states the *legal* right to secede unilaterally from their 'parent' state" (*Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada*, 1998,

S.C.R., Vol. 2, p. 217, para. 111; emphasis added). This, in my view, correctly reflects the present state of the law with respect to the question the Supreme Court of Canada was asked, namely,

> "Does international law give the National Assembly, Legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?. In this regard, is there a right to self-determination under international law that would give the National Assembly, Legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" (*Ibid.*, para. 2.)

The question now before the Court, on the other hand, asks not about the existence of a "right" to declare independence but about the "accordance" of a declaration of independence with international law. This provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. That court, in response to the specific question asked, made clear that international law does not grant a right to secede. This Court, in response to the specific question asked by the General Assembly, should have made clear that the applicable international law in the case before the Court contains rules and principles explicitly preventing the declaration of independence and secession. The unilateral declaration of independence of 17 February 2008 was tantamount to an attempt to secede from Serbia and proclaim Kosovo a sovereign independent State created out of the latter's territory. The applicable international law in this case, together with resolution 1244 (1999), prohibits such a proclamation and cannot recognize its validity.

24. At the time resolution 1244 (1999) was adopted, the Federal Republic of Yugoslavia was, and it still is, an independent State exercising full and complete sovereignty over Kosovo. Neither the Security Council nor the Provisional Institutions of Self-Government of Kosovo, which are creations of the Council, are entitled to dismember the Federal Republic of Yugoslavia (Serbia) or impair totally or in part its territorial integrity or political unity without its consent.

25. It is for these reasons that the Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

(Signed) Abdul G. KOROMA.

[Original: English]

DECLARATION OF JUDGE SIMMA

The Court's interpretation of the General Assembly's request is unnecessarily limited and potentially misguiding — The Court's approach reflects an outdated view of international law — The request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law — Yet, the Court's embrace of "Lotus" *entails that everything which is not expressly prohibited carries with it the same colour of legality — The Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of toleration — By so limiting itself, the Court has reduced the advisory quality of the Opinion.*

1. Although I concur with the Court on the great majority of its reasoning and on the ultimate reply it has given to the General Assembly, I have concerns about its unnecessarily limited — and potentially misguiding — analysis. Specifically, in paragraph 56 the Advisory Opinion interprets the General Assembly's request to ask only for an assessment of whether the Kosovar declaration of independence was adopted in violation of international law, and it does so in a way that I find highly problematic as to the methodology used. In my view, this interpretation not only goes against the plain wording of the request itself, the neutral drafting of which asks whether the declaration of independence was "in accordance with international law" (see Advisory Opinion, paragraph 1); it also excludes from the Court's analysis any consideration of the important question whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met.

2. I find this approach disquieting in the light of the Court's general conclusion, in paragraph 3 of the operative clause (Advisory Opinion, paragraph 123), that the declaration of independence "did not violate international law". The underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the *"Lotus"* Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18). As the Permanent Court did in that case (*ibid.*, pp. 19-21), the Court has concluded in the present Opinion that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition.

3. In this respect, in a contemporary international legal order which is strongly influenced by ideas of public law, the Court's reasoning on this point is obsolete. By way of explanation, I wish to address two points in the present declaration. First, by unduly limiting the scope of its analysis, the Court has not answered the question put before it in a satisfactory manner. To do so would require a fuller treatment of both prohibitive and permissive rules of international law as regards declarations of independence and attempted acts of secession than what was essayed in the Court's Opinion. Secondly, by upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law. The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts.

4. With regard to my first point, I wish to recall the wording of the General Assembly's request, which asked whether Kosovo's declaration of independence was "in accordance with international law" (Advisory

Opinion, paragraph 1). The Opinion considers that in order to answer this request, all the Court needs to do is to assess whether there exists, under international law, a prohibitive rule, thus satisfied that the lack of a violation of international law entails being in accordance therewith (Advisory Opinion, paragraph 56). This interpretation, however, does not sit easily with the actual wording of the request, which deliberately does not ask for the existence of either a prohibitive or permissive rule under international law. Had the General Assembly wished to limit its request in such a manner, it could easily have chosen a clear formulation to that effect. The term "in accordance with" is broad by definition.

5. It is true that the request is not phrased in the same way as the question posed to the Supreme Court of Canada (asking for a "right to effect secession": see Advisory Opinion, paragraph 55). However, this difference does not justify the Court's determination that the term "in accordance with" is to be understood as asking *exclusively* whether there is a prohibitive rule; according to the Court, if there is none, the declaration of independence is *ipso facto* in accordance with international law.

6. In addition, many of the participants, including the authors of the declaration of independence, invoked arguments relating the right to self-determination and the issue of "remedial secession" in their pleadings (see Advisory Opinion, paragraph 82). The Court could have addressed these arguments on their merits; instead, its restrictive understanding of the scope of the question forecloses consideration of these arguments altogether. The relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo and in comprehensively addressing all aspects of the accordance with international law of the declaration of independence. None other than the authors of the declaration of independence make reference to the "will of [their] people" in operative paragraph 1 thereof, which is a fairly clear reference to their purported exercise of self-determination (see paragraph 75 of the Opinion, where the declaration of independence is quoted in full). Moreover, consideration of these points would very well have been within the scope of the question as understood by the Kosovars themselves, amongst several Participants, who make reference to a right of external self-determination grounded in self-determination and "remedial secession" as a people. The treatment — or rather, non-treatment — of these submissions by the Court, in my opinion, does not seem to be judicially sound, given the fact that the Court has not refused to give the opinion requested from it to the General Assembly.

7. In this light, I believe that the General Assembly's request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law. This would have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/territories. Having said this, I do not consider it an appropriate exercise of my judicial role to examine these arguments *in extenso*; therefore, on this point, I shall content myself simply with declaring that the Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively. To treat these questions more extensively would have demonstrated the Court's awareness of the present architecture of international law.

8. Secondly, apart from these concerns as regards the specific question before the Court, there is also a wider conceptual problem with the Court's approach. The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable".

Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest.

9. By reading the General Assembly's question as it did, the Court denied itself the possibility to enquire into the precise status under international law of a declaration of independence. By contrast, by moving away from *"Lotus"*, the Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration*, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be "tolerated" would not necessarily mean that it is "legal", but rather that it is "not illegal". In this sense, I am concerned that the narrowness of the Court's approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law. Furthermore, that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate. There would be no wider conceptual problem relating to the coherence of the international legal order.

10. For these reasons, the Court should have considered the question from a slightly broader perspective, and not limited itself merely to an exercise in mechanical jurisprudence. As posed by the General Assembly, the question already confines the Court to a relatively narrow aspect of the wider dispute as regards the final status of Kosovo. For the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. To not even enquire into whether a declaration of independence might be "tolerated" or even expressly permitted under international law does not do justice to the General Assembly's request and, in my eyes, significantly reduces the *advisory* quality of this Opinion.

(Signed) Bruno SIMMA.

[Original: English]

SEPARATE OPINION OF JUDGE KEITH

1. The Court, in my view, should have exercised its discretion to refuse to answer the question which the General Assembly submitted to it on 8 October 2008 in resolution 63/3. In this opinion I give my reasons for that conclusion.

2. While the terms of the French text of Article 14 of the Covenant of the League of Nations may have been read as denying the Permanent Court of International Justice a discretion to refuse (the Court "*donnera* aussi des avis consultatifs" on matters submitted to it by the Council or Assembly) and the English text may have been read as an enabling rather than a discretionary provision ("The Court *may* also give an advisory opinion . . ."), the Court made it clear, very early in its life, that it had a discretion to refuse a request. In 1923, in the *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, the Court, having decided that it was "impossible" for it to give the opinion on the dispute before it, continued "that there are other cogent reasons which render it very inexpedient that [it] should attempt to deal with the present question" (p. 28). Those reasons related to the availability of evidence about a factual issue at the heart of the dispute. It was very doubtful, said the Court, that there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact: what did the parties agree to? While that particular reason for refusing to give an opinion does not arise in this case, what is significant, in addition to the Court's recognition that it had a discretion to refuse a request, is its broader statement of principle: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court." (P. 29.)

3. At that early stage the Court was taking care to underline that, in its advisory jurisdiction, it was not simply an adviser to the political organs of the League and, as such, obliged to respond at their beck and call. It was a court and had to maintain its judicial integrity in the exercise of that jurisdiction just as in its contentious jurisdiction. It continued to underline that essential character in its practice and rules relating to its advisory jurisdiction. Those rules were moved in 1936 to the Statute of the Permanent Court and were in turn included in the Statute of this Court. Notable among them is Article 68: "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." Article 65 (1), in the only addition to the Chapter on Advisory Opinions included in the Statute of this Court, expressly recognizes that the Court has a discretion whether to reply to a request: "The Court *may* give an advisory opinion on any legal question . . ."

4. That discretion exists for good reason. The Court, in exercising it, considers both its character as a principal organ of the United Nations and its character as a judicial body. In terms of the former, the Court early declared that its exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, *in principle*, should not be refused (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 71-72). That indication of a strong inclination to reply is also reflected in the Court's later statement that "compelling reasons" would be required to justify a refusal (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86). While maintaining its integrity as a judicial body has so far been the reason for refusal which the Court has emphasized, it has not ever identified it as the *only* factor which might lead it to refuse. So too may other considerations, including the interest of the requesting organ and the relative interests of other United Nations organs, discussed later.

5. That discussion of the law highlights the link between the interest of the requesting organ and the strong inclination or the duty, as it is sometimes put, of the Court to reply. Accordingly, I consider in some detail the facts relating to this particular request and the relative interests of the General Assembly and Security Council. The exercise of the discretion, recognized by Article 65 (1) of the Statute, should not, in a case such as this, be unduly hampered by a label such as "compelling reasons".

6. The issue which for me is decisive is whether the request in this case should have come from the Security Council rather than from the General Assembly and whether for that reason the Court should refuse to answer the question. That statement of the issue raises the question whether the Court may properly raise such a contention in terms of its participation as a principal organ of the United Nations within the wider United Nations system or for the purpose of protecting the integrity of its judicial function. To make my position clear, I add that I would have been able to see no possible reason for the Court refusing to answer the question in this case had it been put by the Security Council. My concern relates only to the propriety of the Court replying to the General Assembly in the circumstances of this case. I consider that the Court should address that issue of the appropriateness of an organ requesting an opinion if the request is essentially concerned with the actual exercise of special powers by another organ under the Charter, in relation to the matter which is the subject of the request. As will appear, this exact issue has not arisen in respect of any earlier request for an advisory opinion.

* *

7. While my focus is primarily on Security Council resolution 1244 adopted on 10 June 1999 and on the actions taken after that date by the Security Council and the General Assembly, some earlier actions are also relevant to an assessment of their relative roles since that date and in particular in late 2008 when the Assembly made its request to the Court. In the 1990s both bodies had substantial roles in respect of the developing crises and armed conflicts in the territory of the Socialist Federal Republic of Yugoslavia and the new States formed from it. The Security Council's concern was primarily with the issues of international peace and security arising there and, in that context, with the introduction of sanctions, the establishment and functioning of peacekeeping forces, and the setting up of the International Criminal Tribunal for the Former Yugoslavia. Between 31 March 1998 and 14 May 1999 the Council also adopted four resolutions relating specifically to Kosovo. All were adopted under Chapter VII of the Charter and, as the "crisis" developed into a "humanitarian catastrophe", made various calls and demands on the Federal Republic of Yugoslavia, the Kosovo Albanian leadership and others. (See also resolution 1367 (2001) ending the prohibition on the sale and supply of arms imposed in the first of those resolutions.)

8. The General Assembly's involvement in that earlier period was principally with the situation of human rights, at first in the territory of the former Yugoslavia in general (e.g., General Assembly resolution 48/153 (1993), para. 17 of which is concerned with Kosovo), and, from 1995, in Kosovo specifically. The last resolution in that annual series (General Assembly resolution 54/183) was adopted on 17 December 1999. In it, the Assembly gives major place to resolution 1244 and the role of the newly established United Nations Mission in Kosovo (operative paragraphs 1, 2, 3 and 5). While between 2000 and 2006 the Assembly adopted resolutions relating to the "Maintenance of international security — good neighbourliness, stability and development in South-Eastern Europe", its references to Kosovo were essentially limited to resolution 1244 and the processes under it (e.g., General Assembly resolution 61/53). Since 1999, the only resolutions adopted by the Assembly relating particularly to Kosovo have been those, adopted under Article 17 (1) of the Charter, approving the budget of UNMIK for the following year, and, of course, the resolution requesting the opinion in this case, a request which, uniquely in the practice of the Assembly and the Council, did not arise from a more general agenda item.

9. Two features of those budget resolutions are significant. The first is that the sums approved year by year for the Mission until 2008 were between US$200 and US$400 million, with between 5,000 and 10,000 personnel; but for the years since they have been substantially reduced to about US$50 million, with 500 personnel. That reduction reflects the major role exercised since December 2008 by EULEX, with a budget of over US$300 million and over 2000 staff, with a target of 3000. The second feature of the resolutions is that the Assembly's consideration of them does not involve it or its Fifth Committee in any substantive consideration of the situation in Kosovo, including political developments there; rather, the Secretary-General and the ACABQ submit relevant reports and proposals to the Fifth Committee and the resulting resolutions focus on the financing of the Mission, including the obligations of States to pay their assessed contributions and those which are outstanding. To the extent that the resolutions go beyond the funding of the Mission, they are concerned with the financing of peacekeeping operations elsewhere in the world and with the safety and security of the members of the Mission (e.g., paras. 4-7 and 24 of General Assembly resolution 63/295). The limited role of the Assembly in respect of this budget matter is not unusual. For one thing, some parts of the budget adopted by the General Assembly are included to meet existing financial obligations of the United Nations, which cannot be denied, as the Court made clear in its Opinion relating to the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, pp. 47 ff.).

10. The introduction of EULEX along with the related scaling down of the role of UNMIK and the reduction of its budget were the subject of discussions in the Security Council in November 2008 and in the Fifth Committee and the General Assembly in June 2009. The first resulted in a Presidential Statement which welcomed the intentions of Belgrade and Pristina to co-operate with the international community (see para. 13 below). When on 3 June 2009 the much reduced UNMIK budget for the following year was being considered in the Fifth Committee the Serbian representative expressed concern and stated that the reduction contravened resolution 1244 as it went beyond what had been welcomed by the Security Council and was unacceptably based on the unilateral declaration of independence, "thereby contradicting the status-neutral position of UNMIK" (A/C.5/63/SR 51, para. 16). The Serbian proposal for the creation of three professional posts in the Office of the Special Representative for co-ordination and co-operation between UNMIK and EULEX was included in the budget, with the Serbian representative in the plenary expressing his country's satisfaction at that development "as part of the status-neutral framework of the Council's resolution 1244 (1999)" (A/63/PV.93, p. 6).

11. Against that background of a very limited General Assembly involvement with the situation in Kosovo since 1999, I turn to the sharply contrasting role of the Security Council and UNMIK established under resolution 1244. The Council, in that resolution, "acting for [the purposes set out in the preamble] under Chapter VII of the Charter of the United Nations", authorizes certain actions, makes a number of decisions and associated requests, and makes certain demands. The Council authorizes both an international security presence and an international civil presence. In respect of the first, it authorizes Member States and relevant international organizations to establish the international security presence in Kosovo with all necessary means to fulfil its responsibilities which are set out in some detail in a non-exhaustive list which includes in paragraph 9:

> "*(c)* Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
>
> *(d)* Ensuring public safety and order until the international civil presence can take responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence".

In the second, the Council authorizes the Secretary-General,

> "with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo".

Among the main responsibilities of the international civil presence, stated in paragraph 11, are:

"*(a)* Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo . . .;

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

. . . . . .

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo".

Those two international presences (one civil, one security) were established for an initial period of 12 months and were to continue thereafter unless the Security Council should decide otherwise. The Council requested the Secretary-General, in consultation with it, to appoint a Special Representative to control the implementation of the international civil presence and to ensure that both international presences operated towards the same goals and in a mutually supportive manner.

12. While the Council "[r]eaffirm[ed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia", the effect of the resolution, as long as it remained in effect, was to displace the administrative and related functions of the Federal Republic of Yugoslavia which it would otherwise have exercised through its institutions as the sovereign over the territory of Kosovo. The plenary character of the authority of UNMIK and of the Special Representative over the territory of Kosovo was manifested at the outset in the first UNMIK regulation adopted by the Special Representative. Under it

"[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative".

13. Resolution 1244 requested the Secretary-General to report to the Council at regular intervals on the implementation of the resolution including reports from the leaderships of both presences. Those reports, submitted on average every three months, are the subject of debate in which the members of the Council and other participants address developments as they see them. Because of the political divisions within the Council (which explain its lack of comment on the Assembly request in this case) it has only once been able, since it adopted the resolution, to formulate an agreed position relating to the situation in Kosovo. It did that in the Presidential Statement of 26 November 2008 (S/PRST/2008/44) in which it welcomed the intentions of Belgrade and Pristina to co-operate with the international community and continued as follows:

> "The Security Council welcomes the cooperation between the UN and other international actors, within the framework of Security Council Resolution 1244 (1999), and also welcomes the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional stability and prosperity."

It follows, as indeed is generally accepted including by the authorities in Kosovo, that the resolution continues to be in effect along with the presences established under it.

14. What is to be concluded from the above account, in terms of the relative and absolute interests of the General Assembly and the Security Council in the matter submitted to the Court by the Assembly? Resolution 1244 adopted by the Security Council, the Council's role under it and the role of its subsidiary organ, UNMIK, are the very subject of the inquiry into the conformity of the declaration of independence with the *lex specialis* in this case — the resolution and the actions taken under it. The resolution, adopted under Chapter VII of the Charter and having binding force, established an interim international territorial administration with full internal powers which superseded for the time being the authority of the Federal Republic of Yugoslavia which remained sovereign. By contrast, the Assembly's only dispositive role since June 1999 and the introduction of that régime has been to approve the budget of the Mission.

* *

15. I return to the case law of the Court and in particular to the critical reason for its recognition that, as a principal organ of the United Nations, it should in principle respond to requests for opinions. The Court regularly couples that recognition with an indication of the interest which the requesting organ has in seeking an opinion from the Court: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 65, 70, 71, 72; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 15, 19-20; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 151, 155, 156; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, para. 32; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, paras. 20 and 72; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, paras. 11, 12; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17 and pp. 162-163, para. 60. Further, in the case of every one of the other requests made by the General Assembly or the Security Council, their interest has been manifest and did not need to be expressly stated in the request or discussed by participants in the proceedings

or by the Court. In the *Wall* Opinion, referring to several of the cases mentioned above, the Court stated this proposition:

> "As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organ the elements of law *necessary for them in their action*." (Para. 60; emphasis added.)

While the Court has made it clear that it will not evaluate the motives of the requesting organ (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; and the *Wall* Opinion, para. 62), it does in practice determine, if the issue arises, whether the requesting organ has or claims to have a sufficient interest in the subject-matter of the request.

16. In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to co-operate does not exist and what is sometimes referred to as its duty to answer disappears.

17. In this case the Court, in my opinion, has no basis on which to reach the conclusion that the General Assembly, which has not itself made such a claim, has the necessary interest. Also very significant for me is the almost exclusive role of the Security Council on this matter. Given the centrality of that role for the substantive question asked (as appears from Part IV B of the Court's Opinion) and the apparent lack of an Assembly interest, I conclude that the Court should exercise its discretion and refuse to answer the question put to it by the General Assembly.

18. I add that I do not see the *Admissions*, *Certain Expenses*, *Namibia* and *Wall* Opinions, on which the Court relies in this context, as affecting this conclusion. In all of those cases, both the General Assembly and the Security Council had a real interest. In the one case in which a Security Council resolution was expressly at the centre of the request, *Namibia*, it was the Council that made the request. In the *Admissions* case in which the General Assembly in its request had referred to the exchange of views which had taken place in meetings of the Security Council the Court determined that the abstract form in which the question was stated precluded the interpretation that it should say whether the views referred to were well founded or not (*I.C.J. Reports 1947-1948*, p. 61). While, in the *Certain Expenses* case, the Court, in replying to a request from the General Assembly, did consider a sequence of Security Council resolutions, one building on the other, it did not face issues of interpretation of those resolutions of the kind involved in this case (*I.C.J. Reports 1962*, pp. 175-177). Further, none of those cases involved anything comparable to the régime of international territorial administration introduced by Security Council resolution 1244.

* *

19. As is indicated by my vote, I agree with the substantive ruling made by the Court, essentially for the reasons it gives.

(Signed) Kenneth KEITH.

[Original: English]

SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR

Fully subscribes to the Court's decision to comply with the request for an advisory opinion — There are no compelling reasons to decline to exercise jurisdiction in respect of the present request — The Court, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, has a duty to exercise its advisory function in respect of legal questions which, like the present one, relate to Chapter VII situations — A Chapter VII determination requires a positive response from the principal judicial organ of the United Nations as one not only entitled but, first and foremost, required to participate in and contribute to the attainment of peace.

Unable to agree with the reasoning of the Court to the effect that the authors of the declaration of independence (DoI) did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework — Arguments advanced by the Court rest upon intentions attributed to the authors of the DoI, inferences drawn from its language and procedural particularities accompanying its adoption — Purpose of the authors of the DoI was to establish an independent and sovereign State — Question is whether the measure was in accordance with legal order in force in Kosovo in 2008 — The Court should have proceeded to assess legality of the DoI by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

The Court could have taken a broader perspective, providing a more comprehensive response to the request by the General Assembly — Although the Court is not asked to decide on consequences produced by the DoI, but only to determine whether it is in accordance with international law, the larger picture is necessary — Issues such as the scope of self-determination, "remedial secession", the extent of the powers of the Security Council in respect of territorial integrity, the fate of a Chapter VII international administration, complexities in the relationship between UNMIK and the Provisional Institutions of Self-Government, and the effect of recognition and non-recognition in the present case fall within the realm of the Court's advisory functions.

I. The Court's discretionary powers

1. I have voted in favour of the Court's decision to comply with the General Assembly's request for an advisory opinion, persuaded as I am that "there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request" (Advisory Opinion, paragraph 48).

2. Not only do I fully subscribe to the reasoning espoused by the majority of the Members of the Court in upholding the propriety of rendering an advisory opinion in the instant case; I am also of the opinion that the Court, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, has a duty to exercise its advisory function in respect of legal questions which, like the present one, relate to Chapter VII situations.

3. In other words, the fact that in relation to the Kosovo question, the Security Council, which remains actively seised of the matter, has acted under Chapter VII of the United Nations Charter and determined, in resolution 1244 (1999), that "the situation in the region continues to constitute a threat to international peace

and security", is, in and of itself, a "compelling reason" for the Court to comply with the General Assembly's request.

4. Notwithstanding the fundamentally discretionary nature of the Court's advisory function under Article 65, paragraph 1, of its Statute, this Court has never declined to respond to a request for an advisory opinion, provided the conditions of jurisdiction have been met (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). To follow the same path in the present case will enhance legal certainty and ensure predictability and consistency in the Court's jurisprudence.

5. The Court has repeatedly acknowledged that the discharge of its advisory function "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, pp. 78-79, para. 29; *Legal Consequences of the* Construction *of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004 (I)*, p. 156, para. 44).

6. According to well-established jurisprudence, "only 'compelling reasons' should lead the Court to refuse its opinion in response to a request falling within its jurisdiction" (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44).

7. As indicated by the Court in paragraph 29 of its Advisory Opinion, "[t]he discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function".

8. In assessing the propriety of rendering an advisory opinion in any given case, consideration must be given to the particular responsibilities accorded to the Court within the architecture of the United Nations Charter. In this regard, the proposition that the Court's judicial functions are inextricably linked to the maintenance of international peace and security is, in my view, indisputable. It could hardly be otherwise, if one considers that the Court is the principal judicial organ of a world organization whose very *raison d'être* was the preservation of peace amongst its members.

9. The Court acknowledged as much in its Order on provisional measures in the case concerning the *Legality of the Use of Force* (*Yugoslavia* v. *Belgium*). After expressing profound concern at the use of force in Yugoslavia, the Court declared itself to be "mindful of the purposes and principles of the United Nations Charter and of *its own responsibilities in the maintenance of [international] peace and security under the Charter and the Statute of the Court*" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999 (I), I.C.J. Reports 1999*, p. 132, para. 18; emphasis added).

10. The Court's role in the maintenance of international peace and security through the exercise of its contentious and advisory jurisdiction, finds support in the United Nations Charter, the Court's Statute and the subsequent practice of the main United Nations organs, including the Court's own jurisprudence.

11. Pursuant to Article 36, paragraph 1, of its Statute, the Court's jurisdiction "comprises all . . . matters specially provided for in the Charter of the United Nations . . .". Those matters surely include the purposes and principles of the Organization, foremost amongst which is "[t]o maintain international peace and

security, and to that end: . . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article 1, paragraph 1, of the United Nations Charter).

12. For its part, Article 36, paragraph 3, of the Charter provides that, in making recommendations for the peaceful settlement of disputes under Chapter VI, the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

13. With regard to the Court's jurisprudence, it is important to note that the Court "has never shied away from a case brought before it merely because it had political implications" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 435, para. 96) or declined a request for an advisory opinion merely because of its allegedly adverse political consequences.

14. In the *Nuclear Weapons* case, the Court explained that

> "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute'. . . . Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

As the Court stated in 1980, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33).

15. The Security Council's primary responsibility for the maintenance of international peace and security, pursuant to Article 24 of the United Nations Charter, has not been an obstacle to the Court affirming the General Assembly's as well as its own complementary responsibilities in this field, within their respective spheres of competence.

16. Thus, the Court has consistently underscored that, whilst primary, the Security Council's responsibilities under Article 24 of the Charter are by no means exclusive (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 434, para. 95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* pp. 148-149, paras. 26-27).

17. In *Nicaragua* (Jurisdiction and Admissibility), the Court advanced the view that "the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*" (*Military and Paramilitary Activities in and against Nicaragua*

(Nicaragua v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 433, para. 93).

18. Prior to that, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court took the opportunity to emphasize the different demarcation of competences operated by the United Nations Charter between, on the one hand, the Security Council and the General Assembly, and, on the other, the Security Council and the Court itself:

> "Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter . . ." (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 22, para. 40.)

In view of the foregoing, the Court concluded in *Nicaragua* (Jurisdiction and Admissibility) that

> "The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* pp. 434-435, para. 95.)

19. In my view, although formulated in the context of contentious proceedings, the rationale behind the Court's role in the maintenance of international peace is equally relevant to the Court's advisory function. This is underscored by Article 96 of the Charter, which must be interpreted as implicitly acknowledging the Court's contribution to the work of the United Nations' main political organs through the exercise of its advisory jurisdiction in respect of any "legal questions".

20. In light of the above, one cannot presume that, due to the discretionary nature of the Court's advisory function pursuant to Article 65 of the Statute, the Court is in any way predisposed to decline requests for advisory opinions whenever a legal question may have implications for the maintenance of international peace and security.

21. The question that forms the object of the request submitted by the General Assembly in the instant case is one that certainly has such implications. Not only has the Security Council branded the situation in Kosovo a threat to international peace and security (resolution 1203 (1998), of 24 October 1998, and resolution 1244 (1999), of 10 June 1999), but, more importantly, it has gone as far as to institute an unprecedented international régime of civil administration under Chapter VII of the United Nations Charter.

22. A Chapter VII situation requires a positive response from the principal judicial organ of the United Nations as one not only entitled but, first and foremost, required to participate in and contribute to the attainment of peace. The Court fulfils its legal duties when requested to do so, by providing assistance and guidance which may help in preventing an aggravation of a conflict. On the Kosovo question, one important contribution of the Court is to interpret Security Council resolution 1244, including a determination that it remains in force and that only the Security Council has the authority to determine that it is no longer in effect.

II. Resolution 1244 (1999), the Constitutional Framework and the authors of the declaration of independence

23. Whilst fully concurring with the Court's finding that, in relation to the identity of the authors of the declaration of independence (hereinafter the "DoI"), the Court is not bound by the terms of General Assembly resolution 63/3 of 8 October 2008 and, therefore, that it is for the Court to decide whether the DoI was promulgated by Kosovo's Provisional Institutions of Self-Government or by some other entity (Advisory Opinion, paragraph 54), I fail to agree with the reasoning followed by the Court to the effect that

> "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (Advisory Opinion, paragraph 109).

24. In my view, the arguments advanced by the Court in support of its conclusion are not persuasive, resting as they do upon intentions attributed to the authors of the DoI, inferences drawn from the language of the DoI and the procedural particularities that accompanied its adoption.

25. It may well be that the DoI presented a number of peculiarities that differentiated it from other acts adopted by the Assembly of Kosovo as a Provisional Institution of Self-Government acting within the Constitutional Framework. However, the overriding issue is whether the DoI is in accordance with Security Council resolution 1244 (1999), UNMIK regulations and Kosovo's Constitutional Framework, which together constitute the paramount legal order applicable to the situation in Kosovo at the time of the DoI.

26. The Court notes, in support of its argument, the declaration's failure to expressly state that it was the work of the Assembly of Kosovo, and the fact that the first paragraph of the DoI commences with the phrase "We, the democratically-elected leaders of our people . . .", in contrast to what appeared to be the common practice of the Assembly of Kosovo, which used the third person singular (as opposed to the first person plural) in the text of adopted acts (Advisory Opinion, paragraph 107).

27. The procedure followed in the adoption of the DoI may also have differed from the regular procedure generally followed by the Provisional Institutions of Self-Government in that it was signed by the President of Kosovo (who was not a member of the Assembly) and was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

28. Whereas the aforementioned particularities are a matter of fact, it is questionable whether, as a matter of law, these circumstances, either taken together or viewed in isolation, logically and ineluctably lead to the conclusion espoused in the present Advisory Opinion, namely, that the authors of the DoI were persons other than the representatives of the people of Kosovo acting in their capacity as members of the Assembly of Kosovo as one of Kosovo's Provisional Institutions of Self-Government.

29. Thus, one wonders how the declaration's failure to expressly refer to the Assembly of Kosovo as the organ of adoption could possibly alter the fact that it was indeed the Assembly which adopted it, or how to explain that the Assembly was made up of the same representatives, yet acting in a different capacity. One also wonders how it is that the DoI "was not intended by those who adopted it to take effect within the legal order created for the interim phase" (Advisory Opinion, paragraph 105) and that its authors "were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government" (Advisory Opinion, paragraph 121). It is clear that the purpose of the authors of the DoI was to establish Kosovo "as an independent and sovereign State". The question is whether the measure was in accordance with the legal order in force in Kosovo in 2008.

30. Had the Assembly of Kosovo adopted a decision falling squarely within its powers and attributions under the Constitutional Framework, the question of authorship would not have arisen, irrespective of whether or not that decision expressly stated that it had been adopted by the Assembly. Taking all factors into account, it is difficult to conclude that the authors of the DoI were "persons who acted together in their capacity as representatives of the people of Kosovo *outside the framework of the interim administration*" (Advisory Opinion, paragraph 109; emphasis added) and, as a consequence, outside resolution 1244 and outside the Constitutional Framework.

31. Similar considerations apply to the inferences drawn in the present Advisory Opinion from the formulation contained in the first paragraph of the DoI ("We, the democratically-elected leaders of our people . . ."). It is difficult to see how the difference in conjugation (first person plural, as opposed to the third person singular commonly used by the Assembly of Kosovo) may reasonably lead to the conclusion that an organ or entity other than the Assembly of Kosovo adopted the declaration of independence. After all, were not the representatives of the Assembly "democratically-elected leaders" of Kosovo?

32. According to what is, in my view, a more plausible reading of the record, the Court should have concluded that, linguistic and procedural peculiarities aside, the Assembly of Kosovo did indeed adopt the DoI of 17 February 2008 in the name of the people of Kosovo. As a result, the Court should have proceeded to assess the legality of that declaration by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

III. Concluding remarks

33. The Court, in its Advisory Opinion, could have taken a broader perspective in order to provide a more comprehensive response to the request by the General Assembly. A number of important legal issues should not have been ignored. As Spain indicated during the oral proceedings,

> "the Court will not be able to respond appropriately to the question put by the General Assembly without taking two elements into consideration: first, the fact that the objective to be achieved through the Unilateral Declaration of Independence is the creation of a new State separate from Serbia; and, second, the fact that the Declaration was adopted to the detriment of an international régime for Kosovo established by the Security Council and governed by the norms and principles of international law, as well as by the Charter of the United Nations" (CR 2009/30, p. 11, para. 17).

34. It is true that the Court, in the present request, is not being asked to decide on the consequences produced by the DoI, but only to determine whether it is in accordance with international law. However, the Court is entitled to address a wider range of issues underlying the General Assembly's request. The Court has

faced similar dilemmas in the past and has chosen to adopt a broader approach. In a previous Advisory Opinion, it stated that

> "if [the Court] is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para. 35; emphasis added).

The Court then indicated that

> "a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization" (*ibid.*, p. 89, para. 35).

35. Many of the legal issues involved in the present case require the guidance of the Court. The Security Council and the Secretary-General of the United Nations, and not just the General Assembly, would indeed benefit from authoritative statements of law in order to dispel many of the uncertainties that still affect the Kosovo conflict. The scope of the right to self-determination, the question of "remedial secession", the extent of the powers of the Security Council in relation to the principle of territorial integrity, the continuation or derogation of an international civil and military administration established under Chapter VII of the Charter, the relationship between UNMIK and the Provisional Institutions of Self-Government and the progressive diminution of UNMIK's authority and responsibilities and, finally, the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions.

(Signed) Bernardo SEPÚLVEDA-AMOR.

[Original: English and French]

DISSENTING OPINION OF JUDGE BENNOUNA

Propriety of the Court giving an advisory opinion — Respect for the integrity of the Court's judicial function — Frivolous requests for advisory opinions — Substitution of the Court for the Security Council in exercising its political responsibilities — Scope and meaning of the question put to the Court — Accordance with international law of the declaration of independence adopted in the context of a territory under United Nations administration — Identity of the authors of the unilateral declaration of independence — Consequences of the stalemate in the Security Council — Interpretation of "silence" in international law — Lex specialis and general international law — Constitutional Framework established by UNMIK.

1. Before turning to the reasons which have prevented me from concurring with the Opinion of the Court, I should first like to consider the propriety of the Court embarking on an exercise that is so hazardous for it, as the principal judicial organ of the United Nations, by responding to the request for an advisory opinion submitted to it by the General Assembly in resolution 63/3 of 8 October 2008.

2. That resolution was adopted in circumstances that are without precedent in the history of the United Nations. It is the first time that the General Assembly has sought an advisory opinion on a question which was not, as such, on its agenda and which it had until then dealt with essentially in terms of authorizing the expenditure of the United Nations Mission in Kosovo (UNMIK). It is recognized that, in substance, the whole of this question had fallen under the exclusive jurisdiction of the Security Council for at least ten years or so, in particular since the latter decided to place the territory of Kosovo under international administration (resolution 1244 of 10 June 1999) — with the exception, however, of General Assembly resolution 54/183 on the Situation of Human Rights in Kosovo, of 17 December 1999 (Advisory Opinion, paragraph 38).

3. I believe that if it had declined to respond to this request, the Court could have put a stop to any "frivolous" requests which political organs might be tempted to submit to it in future, and indeed thereby protected the integrity of its judicial function. What is at issue above all in this case is protecting the Court itself against any attempts to exploit it in a political debate, rather than protecting the balance between the principal political organs of the United Nations (the General Assembly and Security Council), a matter which the Court discusses at some length (Advisory Opinion, paragraphs 37-48), or indeed the question of the self-determination and independence of Kosovo, which has rightly been disregarded as lying beyond the scope of the request for an opinion (Advisory Opinion, paragraph 83).

1. The propriety of the Court giving an advisory opinion

4. It should be recalled that, when the Court receives a request for an advisory opinion, pursuant to Article 65 of its Statute, it is not obliged to comply with the request if it considers that giving a reply to the question posed would be "incompatible with the Court's judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33).

5. It is true that the Court has recalled on several occasions in its jurisprudence that it has discretion to consider the propriety of giving an advisory opinion (since the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*), but it has hitherto never exercised that authority, to the extent that scholarly opinion has begun to cast doubt on whether it

actually exists. The Court is reaching the point of making the propriety of giving its opinion dependent on the requesting organ itself, thereby depriving itself of its own discretionary power (Robert Kolb, "De la prétendue discrétion de la Cour internationale de Justice de refuser de donner un avis consultative", *The international legal system in quest of equity and universality*). The Court has shown itself to be very reluctant to decline to participate in United Nations action when asked to do so by one of the organs of the United Nations. It has thus strictly circumscribed its discretion, stipulating as a condition for exercising it the existence of "compelling reasons" for not giving an opinion, yet without making clear what it means by that.

6. However, the question of the compatibility of a request for an opinion with the functions of the Court and its judicial character still stands, even if no case of incompatibility has yet been recorded.

7. In the Kosovo case, the Court has been confronted with a situation that has never occurred before, since it has ultimately been asked to set itself up as a political decision-maker, in the place of the Security Council. In other words, an attempt has been made, through this request for an advisory opinion, to have it take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out.

8. The Court has been asked to give its opinion on whether the unilateral declaration of independence (UDI) of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law; however, the reply to this question cannot be restricted to an analysis of the declaration as a formal act — it is necessary for the Court to consider its content and scope, as well as the circumstances in which it was adopted. In this respect, the Court may not confine itself to general reflections according to which it cannot substitute its own assessment for that of the requesting organ or is unable to form a view as to whether its opinion would be likely to have an adverse effect (Advisory Opinion, paragraph 35).

9. As will be seen below, the declaration was adopted by the Provisional Institutions of Self-Government of Kosovo established by resolution 1244 of the Security Council. It follows the mission which the Secretary-General of the United Nations, Mr. Kofi Annan, gave to his Special Envoy, Mr. Martti Ahtisaari, in November 2005, which was to lead the political process aimed at determining the future status of Kosovo, in the context of resolution 1244, by means of a negotiated settlement.

10. Mr. Martti Ahtisaari was thus called upon to act as a mediator between Serbia and the representatives of the institutions of Kosovo (the Assembly) so that they reach an agreement on the future status of the territory; such an agreement would then have to be endorsed by the Security Council.

11. In his final report of 26 March 2007 on Kosovo's future status, transmitted to the Security Council by Secretary-General Ban Ki-moon and with his support, Mr. Ahtisaari took the view that "[i]ndependence is the only option for a politically stable and economically viable Kosovo", and proposed that such independence should be supervised and supported for an initial period by international civilian and military presences. Mr. Ahtisaari concluded by urging the Security Council to endorse his proposal (Report transmitted to the President of the Security Council by letter from the Secretary-General, 26 March 2007, S/2007/168).

12. In the end, it was the Assembly of Kosovo that did so, thereby substituting itself for the Security Council. Serbia then asked the Court, through the General Assembly of the United Nations, to pronounce on the declaration of independence of 17 February 2008, whereby that substitution occurred, in order to establish whether it is in accordance with international law. It is therefore clear that, by giving the advisory opinion which has been requested of it, the Court is assessing, albeit indirectly, the validity of the conclusions of the Ahtisaari report, a role which belongs solely to the Security Council, a political organ on which the United

Nations Charter confers primary responsibility for the maintenance of international peace and security. That organ, by adopting resolution 1244 on the basis of Chapter VII of the Charter, established an interim administration in Kosovo and has initiated, after some ten years, a process for bringing it to an end, at the same time determining the final status of the territory.

13. How, in these circumstances, can the Court pronounce on the accordance with international law of Kosovo's declaration of independence, when such an assessment is a matter for the Security Council alone and that organ has not sought its opinion on the question?

14. That is why the Court, in this case, should have exercised its discretionary power and declined to give its opinion on a question which is incompatible with its status as a judicial organ. Beyond the question of the accordance with international law of the declaration of independence, what is at issue here is the exercise of the powers of a political organ of the United Nations, the Security Council. As for the Ahtisaari report, as long as the Security Council makes no finding in this respect, it commits only its author.

15. It is essential for the Court to ensure, in performing its advisory function, that it is not exploited in favour of one specifically political strategy or another, and, in this case in particular, not enlisted either in the campaign to gather as many recognitions as possible of Kosovo's independence by other States, or in the one to keep these to a minimum; whereas the Security Council, which is primarily responsible for pronouncing on the option of independence, has not done so.

16. I am aware of the fact that the Court has a duty to contribute to United Nations action in legal terms, but here, the decision on the future status of Kosovo is not a matter for the General Assembly, which has submitted the request for an opinion to the Court, but for the Security Council. In this case, the Court cannot pronounce on the legality of the declaration of independence without interfering in the political process of maintaining peace established by the Security Council some ten years ago, which that organ has been unable to bring to a conclusion.

17. A response from the Court would have been conceivable if the substantive debate on Kosovo had moved from the Security Council to the General Assembly, for example through the convening of an emergency special session of the General Assembly under the terms of resolution 377 (V) A, entitled "Uniting for peace", as was the case with the request for an advisory opinion by the General Assembly concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 145-146, paras. 18-19). In that case, however, the General Assembly had been continuously involved in the debate on the issue of the Middle East and the Palestinian question since the partition plan of 1947, and these were included year after year on its agenda. In contrast, the Kosovo case has been solely the responsibility of the Security Council since the armed intervention by NATO forces in Serbia in 1999.

18. Consequently, while Serbia initiated the inclusion on the General Assembly's agenda of a request for an advisory opinion of the Court, that was not in order to allow the Court to pronounce on certain legal aspects of the debate which the General Assembly had started on the Kosovo case, but because it saw in this the only opportunity still available to it to challenge the unilateral declaration of independence of 17 February 2008. What is involved here is not the "motives of individual States which sponsor . . . a resolution requesting an advisory opinion", which "are not relevant to the Court's exercise of its discretion" (Advisory Opinion, paragraph 33), but rather an assessment of the situation in Kosovo and of the handling of it, by the United Nations, at the point when the General Assembly adopted the request for an opinion on 8 October 2008.

19. Moreover, there was no real debate on the question of the status of Kosovo when the General Assembly adopted resolution 63/3 requesting an advisory opinion of the Court (General Assembly, Sixty-third session, A/63/PV.22, 8 October 2008).

20. It may be questioned, therefore, whether the request for an advisory opinion adopted by the General Assembly (by 77 votes to six, with 74 abstentions) is compatible with the Court's functions as a judicial organ, as defined by the Charter of the United Nations and by the Statute of the Court.

21. Furthermore, whatever the Court's response to the question put by the General Assembly, it will not in any way assist that political organ, which cannot, in the light of the opinion, either modify Security Council resolution 1244 or interpret it accordingly, since that task falls to the organ which adopted it. It is not enough to say that only the Assembly can appreciate the reasons which have led it to request an advisory opinion (Advisory Opinion, paragraph 34), since that would mean the Court abandoning outright the exercise of its discretion as to the propriety of giving such an opinion. All the protagonists in the Kosovo case have stated in advance, in particular before the Court, that the opinion, whatever it may be, will have no impact on their position in relation to the declaration of independence. Therefore, the advisory opinion can only be used as an argument in the political debate taking place between the supporters of recognizing Kosovo's independence and those who are against it.

22. By becoming enlisted in this way, the Court has everything to lose in this political contest, without contributing in any real way either to reducing the tensions caused by the unilateral declaration of independence or to clarifying the functions and responsibility of the United Nations in respect of a territory placed under its administration.

23. In addition, since the declaration of independence of 17 February 2008, the fait accompli of the creation of Kosovo as an independent entity has been reflected on the ground, with the increasing *de facto* marginalization of the United Nations presence and its administration. Such a situation makes the propriety of responding to the question posed by the General Assembly yet more dubious and problematic, while the United Nations has given the impression of adapting to the new state of affairs (though how could it do otherwise?).

24. The Court itself has to make sure the integrity of its judicial function is respected, in contentious as well as in advisory matters, as it made very clear in its Judgment of 2 December 1963 in the case concerning *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections*:

> "both the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function. Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function. That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved. This Court, like the Permanent Court of International Justice, has always been guided by the principle which the latter stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923:
>
> > 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.' (*P.C.I.J., Series B,*

No. 5, p. 29.)" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 30.)

25. While the Court cannot substitute itself for the Security Council in exercising its responsibilities, nor can it stand legal guarantor for a policy of fait accompli based simply on who can gain the upper hand. Its duty is to preserve its role, which is to state the law, clearly and independently. That is how it will safeguard its credibility in performing its functions, for the benefit of the international community.

26. Those are the reasons which led me to vote against the Court's decision to give an advisory opinion in this case. Having said that, the Court's response to the request of the General Assembly did not strike me as convincing, and I shall now explain why.

2. The scope and meaning of the question posed

27. This second aspect of the opinion is of course linked with the first. Whereas the Court declines to consider either the motivation of the General Assembly or the aims it was pursuing by means of its request for an opinion, it has nonetheless deemed itself authorized to modify the wording of the request, to the point of completely altering its meaning and scope.

28. The Court relies on the fact that neither the agenda item under which resolution 63/3 was debated, nor the title of the resolution specified the identity of the authors of the unilateral declaration of independence, and that the question of their identity was not raised during the debate on the draft resolution. The Court then concludes that it is "free to . . . decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity" (Advisory Opinion, paragraph 54).

29. However, the General Assembly's question could not be more clear, and there is nothing in the debate which preceded the adoption of resolution 63/3 of 8 October 2008 to suggest that the General Assembly's only concern was the accordance with international law of the declaration of independence, regardless of who the authors were. Does the fact that the participants in the debate on the draft resolution (A/63/PV.22) did not raise the question of the identity of the authors of the declaration imply that it is not a relevant consideration for the requesting organ, or is it rather precisely because the question is such an obvious one for all the United Nations Member States that they consequently did not consider it necessary to discuss or contest it? As for the difference noted by the Court between the title of the agenda item, the title of the resolution, and the question submitted to the Court, it is hard to see any significance in this since what matters for the Court is the content of the question put by the General Assembly.

30. This question therefore does not need to be interpreted in any way. And the Court acknowledges this: "the question posed by the General Assembly is clearly formulated. The question is narrow and specific." (Advisory Opinion, paragraph 51.) The General Assembly did not request the Court to give its opinion on just any declaration of independence, but on the one adopted on 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo, which were established with specific competences by the United Nations. On 2 October 2008, however, before the adoption of resolution 63/3, the representative of the United Kingdom addressed a note of issues to the President of the General Assembly in which he indicated that:

> "It would be useful to know whether Serbia is seeking to focus on a narrower question about the competence of the Provisional Institutions of Self-Government of Kosovo, and, if so, precisely how that question relates to Kosovo's status at the present time." (A/63/461 of 2 October 2008.)

31. The answer to that question has been given by Serbia and by the General Assembly. It is indeed a matter of assessing an act adopted by the Provisional Institutions of Self-Government of Kosovo, and not just any act emanating from a hundred or so persons who supposedly declared themselves to be representing the people.

32. At that point in time, the only institution recognized by the United Nations as representing the people of Kosovo was the elected Assembly of the Provisional Institutions of Self-Government. Even supposing that the Court comes to the conclusion that the declaration of independence was not adopted by the Assembly of the Provisional Institutions of Self-Government of Kosovo, acting as such, contrary to the assertion of the General Assembly of the United Nations, should it not then exercise its discretionary power and decline to respond to a question that would no longer have any content or scope? Ultimately, the General Assembly does not expect the Court to provide its legal opinion on a question which it has not put to it, i.e., a declaration issued by a hundred or so persons, unconnected with the United Nations.

33. The Court has in the past extended the question posed in order to reply to it as fully as possible (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 88-89, para. 35). It took the same approach in the Advisory Opinion on *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, pp. 156-157), in which it set out to "examine Article 17 in itself and in its relation to the rest of the Charter"; likewise, the Court was obliged to clarify the question posed when this appeared to be "infelicitously expressed and vague" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46). In these instances, however, the Court remained within the bounds of its judicial functions in taking account of all the applicable law or interpreting a confused or imprecise text.

34. Never, though, has the Court amended the question posed in a manner contrary to its object and purpose, which in this case are to determine whether the declaration of independence of 17 February 2008 did or did not fall within the competence of the Provisional Institutions of Self-Government of Kosovo, as indicated by the United Kingdom representative in his above-mentioned note of 2 October 2008 to the President of the General Assembly.

35. If the Court were able to employ discretion to such an extent, by replying in the end to a question which it has itself adjusted beforehand in order to make it fit a certain mould, then it would seriously prejudice the sense of judicial security that ought to prevail among the States and organs of the United Nations applying to the Court.

3. Accordance with international law of the unilateral declaration of independence

36. The General Assembly made a point of characterizing the declaration of independence as unilateral to make it clear that it issued from only one of the Parties (the Assembly of the Provisional Institutions of Self-Government of Kosovo) involved in the political process, based on Security Council resolution 1244 of 10 June 1999, for the determination of Kosovo's final status.

37. The Court was requested by the General Assembly to give its opinion on the accordance of the declaration with international law. In rendering its opinion, the Court should first of all have ascertained the international law applicable in this area.

38. But, while the Court does describe the legal régime established by the Security Council through resolution 1244 and regulations adopted by the Secretary-General's Special Representative and UNMIK (Advisory Opinion, paragraphs 58-63), it fails first to identify the applicable rules of general international law and to explain how it will go about determining whether the unilateral declaration is in accordance with these two sets of standards. Ordinarily, the Court should first look into the applicable *lex specialis* (that is to say the law of the United Nations) before considering whether the declaration is in accordance with general international law. As observed by the Chairman of the International Law Commission's Study Group on the Fragmentation of International Law: "[P]reference was often given to a special standard because it not only best reflects the requirements of the context, but because it best reflected the intent of those who were to be bound by it." (Report of the International Law Commission, 2004, A/59/10, p. 286.)

39. The Court has chosen instead to examine "the lawfulness of declarations of independence under general international law" (Advisory Opinion, paragraph 78). The General Assembly did not however ask the Court to opine in the abstract on declarations of independence generally but rather on a specific declaration adopted in a particular context — that of a territory which the Council has placed under United Nations administration — and this at a time when Security Council resolution 1244 was in force, and it still is. It would moreover make no sense to assess the accordance with international law of a declaration of independence without regard to who the author(s) are or to the background against which it was adopted. Likewise, the Court's conclusion in this respect is itself meaningless:

> "the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law." (Advisory Opinion, paragraph 84.)

40. This is at best a sophism, in other words reasoning that is logical in appearance alone, because it proceeds from the proposition that what is valid for the whole is valid for the part. Since the principles of general international law, i.e., territorial integrity and self-determination, call here for analysis in the context of a territory under United Nations administration, the Court could not announce its conclusion before examining the law governing the territory as it relates to the declaration of independence.

41. It is only in a second stage that the Court reaches the conclusion that: "Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion" (Advisory Opinion, paragraph 93).

42. While resolution 1244 was indeed concerned with setting up an interim framework of self-government for Kosovo, as the Court notes, I do not see anything to justify the assertion the Court then makes: "at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution" (Advisory Opinion, paragraph 104).

43. It was simply a matter of UNMIK facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords. That political process is what the Special Envoy, Mr. Ahtisaari, was asked by the Security Council to lead through negotiations between Serbia and the elected representatives of Kosovo (the Assembly); as the two Parties were unable to reach agreement, Mr. Ahtisaari proposed a settlement plan to the Council, but the Council never approved it.

44. The facts that the authors of the Declaration, members of the Assembly of the Provisional Institutions of Self-Government of Kosovo, cited the breakdown of negotiations and that they did not intend to act within the framework of the interim régime of self-government (Advisory Opinion, paragraph 105) do not by themselves change the legal nature of an act adopted by the Assembly of the Provisional Institutions of Self-Government of Kosovo. In law, it is not merely because an institution has adopted an act exceeding its powers *(ultra vires)* that the legal bond between the institution and the act is broken. In such a case, the institution must be considered to be in breach of the legal framework that justifies and legitimizes it.

45. Similarly, it is not because the Assembly trespassed on the powers of the Special Representative (Advisory Opinion, paragraph 106) by involving itself in matters of Kosovo's external relations that it must be considered as acting in a different capacity or as an entity no longer related to the Provisional Institutions of Self-Government of Kosovo. Here as well, the Assembly simply committed an act which is illegal under international law.

46. The Court's reasoning, aimed at dispelling any inkling of the declaration's illegality under the law of the United Nations, consisted of severing it from the institution (the Assembly) that was created within this framework: "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government . . . but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (Advisory Opinion, paragraph 109). To reach this conclusion, the Court relies upon the language used and the procedure employed (Advisory Opinion, paragraph 107). Thus it was enough for the authors of the declaration to change the appearance of the text, and to hold themselves out as "the democratically-elected leaders of [the] people" in order for them to cease to be bound by the Constitutional Framework for Kosovo, which states that "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". If such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.

47. With a view to shedding light on this aspect of the question, during the oral proceedings I asked participants generally, and the authors of the declaration of independence specifically (CR 2009/33, p. 24), whether the question of adopting such a declaration had been raised in any form during the campaign for election to the Assembly of the Provisional Institutions in November 2007. A response in the negative was received both from the authors of the declaration of independence and from Serbia (replies by the authors of the declaration of independence and by the Republic of Serbia, dated 22 December 2009). If the members of the Assembly, who had been elected on 17 November 2007, had wished to express the "will of [their] people" in a declaration made on 17 February 2008, they should at least have told their electors so.

48. It is very significant that when he reported to the Security Council at the meeting held on 18 February 2008 (S/PV.5839), the day after the adoption of the declaration of independence of Kosovo dated 17 February 2008, the Secretary-General of the United Nations did so as follows: "Yesterday, my Special Representative for Kosovo informed me that the Assembly of Kosovo's Provisional Institutions of Self-Government held a session during which it adopted a declaration of independence, which declares Kosovo an independent and sovereign State."

49. On the other hand, in his report of 28 March 2008 to the Security Council on the United Nations Interim Administration Mission in Kosovo (S/2008/211) the Secretary-General added, after noting that the electoral process in Kosovo had concluded on 19 December 2007 and that the members of the Assembly of Kosovo had taken their oath on 4 January 2008: "On 17 February, the Assembly of Kosovo held a session

during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State". I would infer that the Secretary-General as well as his special representative were also relying on the address by the Prime Minister of Kosovo on 17 February 2008, when he spoke before the extraordinary meeting of the Assembly of Kosovo:

> "Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested from the President of the Assembly, Mr. Krasniqi; to call for a special session with two agenda items,
>
> This invitation for a special session is extended in accordance with the Kosovo Constitutional framework, whereby we present two items on the agenda:
>
> 1. Declaration of independence for Kosovo, and
>
> 2. Presentation of Kosovo State symbols." (Written Contribution of the authors of the Unilateral Declaration of Independence, 17 April 2009, Ann. 2.)

50. Thus, there was no doubt in the minds of the Secretary-General and his Special Representative in Kosovo that the declaration was in fact the work of the recently elected Assembly of the Provisional Institutions of Self-Government of Kosovo.

51. Of course, the serious problem the declaration raised in respect of the United Nations Mission and the mandate it had been given by the Security Council did not escape the Secretary-General:

> "I immediately drew this development to the attention of the Security Council, so that it could consider the matter. In doing so, I reaffirmed that, pending guidance from the Security Council, the United Nations would continue to operate on the understanding that resolution 1244 (1999) remains in force and constitutes the legal framework for the mandate of UNMIK, and that UNMIK would continue to implement its mandate in the light of the evolving circumstances." (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211 of 28 March 2008.)

52. It must also be kept in mind that when, in its resolution on 7 November 2002, the Assembly of Kosovo had previously asserted the right to determine Kosovo's future status, the Special Representative of the United Nations Secretary-General stated on the same day:

> "Kosovo is under the authority of UN Security Council Resolution 1244 (1999). Neither Belgrade nor Pristina can prejudge the future status of Kosovo. Its future status is open and will be decided by the UN Security Council. Any unilateral statement in whatever form which is not endorsed by the Security Council has no legal effect on the future status of Kosovo."

53. Accordingly, no unilateral declaration affecting Kosovo's future status, whatever the form of the declaration or the intentions of its authors, has any legal validity until it has been endorsed by the Security Council. Contrary to what the Court implies, it is not enough for the authors simply to step beyond the bounds of the law to cease being subject to it.

54. The Court believes the inaction of the Security Council, the Secretary-General and his Special Representative, in response to the declaration of independence, to be confirmation that the declaration was not

the work of the Assembly of Kosovo, and it contrasts this inertia with the actions taken between 2002 and 2005, when "the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the ground that they were deemed to be 'beyond the scope of [the Assembly's] competencies' (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo" (Advisory Opinion, paragraph 108).

55. However, the Security Council was prevented, by a lack of agreement among its permanent members, from taking a decision on the Kosovo question after receiving the Ahtisaari report in March 2007. And, as is often the case within the United Nations, this deadlock in the Council had a reverberating effect on the Secretary-General, charged with implementing its decisions, and his Special Representative.

56. A stalemate in the Security Council does not release either the parties to a dispute from their obligations or by consequence the members of the Assembly of Kosovo from their duty to respect the Constitutional Framework and resolution 1244. Were that the case, the credibility of the collective security system established by the United Nations Charter would be undermined. This would, in fact, leave the parties to a dispute to face off against each other, with each being free to implement its own position unilaterally. And in theory the other Party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory.

57. In my view, stalemate within the Security Council at a particular point cannot justify unilateral acts performed, or faits accomplis created, by either Party, or be deemed tacit approval of them. A failure by the Council to take a decision on account of the veto power of one of its permanent members is contemplated in the Charter. Its legal effect ends there; inaction is itself a political act.

58. On the other hand, although unable to reach a decision on the Ahtisaari report, referred to it in March 2007, the Council nevertheless encouraged attempts at mediation between the Parties, in particular when it decided to send a mission, made up of members of the Council and led by Johan C. Verbeke, representative of Belgium, to Belgrade and Pristina, in April 2007 (S/2007/220 of 20 April 2007), and when it supported the attempts by the troika (made up of the European Union, United States and Russia) created by the Contact Group to reconcile the two Parties (from July to December 2007).

59. This being the case, I cannot endorse the Court's interpretation of the "silence" of the Special Representative of the Secretary-General, which supposedly confirms that the declaration of independence was not the work of the Assembly of the Provisional Institutions of Self-Government of Kosovo.

60. We know just how delicate it can be to interpret an actor's "silence" in international law. In all events, silence must be interpreted by reference to the entirety of the direct context and its background. Here, the deadlock in the United Nations bodies during the process to determine Kosovo's future status does not justify the conclusion that a unilateral declaration of independence hitherto not in accordance with international law is suddenly deserving of an imprimatur of compliance. In fact, the reason why the Special Representative of the Secretary-General took no action was not that he considered the declaration to be in accordance with international law, but simply that the political body to which he was answerable was unable to reach a decision on advancing in the process under way to determine the future status of Kosovo.

61. The Court then reflects on resolution 1244 and arrives at the conclusion that the resolution does not contain a prohibition binding on the authors of the declaration of independence (Advisory Opinion, paragraph 118). And for good reason, since the Provisional Institutions had yet to be created and the authors in question could not yet be identified. In reality, the issue at this juncture is not establishing whether

resolution 1244 was aimed at prohibiting action by the authors of the declaration of independence, but simply recalling the mandatory force of this text, which is binding on the institutions to be created "to provide an interim administration . . . under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia" (paragraph 10 of resolution 1244 (1999) of the Security Council).

62. UNMIK thus adopted the Constitutional Framework and set up the interim administration on the basis of the mandate it had received from the Security Council in resolution 1244. A violation of the Constitutional Framework therefore entails a simultaneous violation of the Security Council resolution, which is binding on all States and non-State actors in Kosovo as a result of the territory having been placed under United Nations administration. This being the case, it is difficult to see how the Court could find that "Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia" (Advisory Opinion, paragraph 119). In my view, it does establish such a bar, on at least two counts: because the declaration is not within the Constitutional Framework established pursuant to the mandate given to UNMIK in the resolution; and because the declaration is unilateral, whereas Kosovo's final status must be approved by the Security Council.

63. Finally, even if it is assumed that the declaration of 17 February 2008 was issued by a hundred or so individuals having proclaimed themselves representatives of the people of Kosovo, how is it possible for them to have been able to violate the legal order established by UNMIK under the Constitutional Framework, which all inhabitants of Kosovo are supposed to respect?

64. The Court responds merely by asserting that, when adopting the declaration of independence, the authors were not bound by the Constitutional framework and that the declaration was not an act intended to take effect within the legal order put in place by the United Nations (Advisory Opinion, paragraph 121). But then what legal order governed the authors and the declaration itself? It was not, in any case, the legal order of Serbia nor that of a new sovereign State. And not being part of the interim institutions does not exempt the authors from the legal order established by UNMIK regulation 1999/1, providing that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". This simply means that all those living in Kosovo are subject to such authority and must comply with the régime of self-government established by the United Nations. Hence, in my opinion, it does not matter whether or not the authors of the declaration of independence are considered to be members of the Assembly of Kosovo; under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council resolution 1244 by running counter to the legal régime for the administration of Kosovo established by the United Nations.

65. That said, the Court has minimized the purport and scope of its Opinion, since it has limited it to the declaration as such, severed from its legal effects. It may therefore be asked: how can this Opinion, wherein it is concluded that a declaration adopted by some one hundred individuals, self-proclaimed representatives of the people, does not violate international law, guide the requesting organ, the General Assembly, in respect of its own action?

66. This remains a complete mystery, even if the Opinion will be exploited for political ends.

67. Expressing my personal view, I would be tempted to say that the result is that the Court's assistance to the General Assembly has emerged trivialized, and this is yet another reason why the Court should have exercised its discretion by refraining from acceding to the request for an opinion.

68. Finally, the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. Accordingly, there is apparently nothing in the law to prevent the United Nations from pursuing its efforts at mediation in respect of Kosovo in co-operation with the regional organizations concerned.

69. Such declarations are no more than foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.

(Signed) Mohamed BENNOUNA.

[Original: English]

DISSENTING OPINION OF JUDGE SKOTNIKOV

1. The Court, in my view, should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the present case. Never before has the Court been confronted with a question posed by one organ of the United Nations, to which an answer is entirely dependent on the interpretation of a decision taken by another United Nations organ. What makes this case even more anomalous is the fact that the latter is the Security Council, acting under Chapter VII of the United Nations Charter. Indeed, in order to give an answer to the General Assembly, the Court has to make a determination as to whether or not the Unilateral Declaration of Independence (UDI) is in breach of the régime established for Kosovo by the Security Council in its resolution 1244 (1999).

2. In the past, the Court has deemed it important to emphasize that it was giving its legal advice in respect of decisions adopted by the requesting organ, in order that the latter could benefit from this advice. In the *Namibia* Advisory Opinion the Court pointed out that:

> "*The request is put forward by a United Nations organ* [the Security Council] *with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions.* This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated 'that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking'." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 32; emphasis added.)

Clearly, the present case is starkly different.

3. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall*, the Court reaffirmed that "advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 162, para. 60). In the present case, the General Assembly is not an organ which can usefully benefit from "the elements of law" to be furnished by the Court. The Assembly, when it receives the present Advisory Opinion, will be precluded, by virtue of Article 12 of the United Nations Charter, from making any recommendation with regard to the subject-matter of the present request, unless the Security Council so requests.

4. The Security Council itself has refrained from making a determination as to whether the UDI is in accordance with its resolution 1244, although it could have done so by adopting a new resolution or by authorizing a statement from the President of the Council. Nor has the Council sought advice from the Court as to whether the issuance of the UDI was compatible with the terms of its resolution 1244. That is the position currently taken by the Council on the issue, which is the subject-matter of the General Assembly's request for an Advisory Opinion from the Court.

5. The Members of the United Nations have conferred distinct responsibilities upon the General Assembly, the Security Council and the International Court of Justice and have put limits on the competence of

each of these principal organs. The Court — both as a principal organ of the United Nations and as a judicial body — must exercise great care in order not to disturb the balance between these three principal organs, as has been established by the Charter and the Statute. By not adequately addressing the issue of the propriety of giving an answer to the present request, the Court has failed in this duty.

6. The majority, in an attempt to justify its position, refers to "an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security" (Advisory Opinion, paragraph 41), a tendency which was noted by the Court in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*. However, the present case simply does not form part of this tendency. It is true that the General Assembly has also adopted resolutions relating to the situation in Kosovo (Advisory Opinion, paragraph 38). However, as is evident from the Advisory Opinion, none of these resolutions is relevant either to the régime established by resolution 1244 or to an answer to the question posed by the General Assembly. The truth is that everything hinges on the interpretation of Security Council resolution 1244.

The majority also cites the *Namibia* Advisory Opinion, as well as the Advisory Opinion on *Certain Expenses of the United Nations* and *Conditions of Admission of a State to Membership in the United Nations* (see paragraphs 46 and 47 of the Advisory Opinion). None of these cases, however, is remotely similar to the present one. In the *Namibia* case, the requesting organ was the Security Council (see para. 2 above). In the *Certain Expenses* Opinion, the Court merely quotes from a number of Security Council resolutions, in order to note the clear existence of "a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 176). In the *Conditions of Admission* Opinion, the Court does not deal with any Security Council resolutions. In both the *Certain Expenses* and *Conditions of Admission* cases, the Court's task was to interpret the United Nations Charter and in both cases the General Assembly, the requesting organ, could have made use of "the elements of law" furnished by the Court. The majority, in addition, refers to the contentious cases of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*. However, in these cases, the Court does not interpret any Security Council resolutions. It only states that Libya, the United States and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the United Nations Charter (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 126, para. 42; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, para. 39).

The majority's inability to find jurisprudence of any relevance is quite understandable since the present case, as explained in paragraph 1, is unprecedented.

7. The Court's failure to exercise its discretion to refrain from giving an answer to the question posed by the General Assembly unfortunately entails serious negative implications for the integrity of the Court's judicial function and its role as a principal organ of the United Nations.

8. In particular, any interpretation of Security Council resolution 1244 which the Court might have given, would have been less than authoritative under the circumstances of the present case.

Indeed, one may recall a dictum by the Permanent Court of International Justice to the effect that "it is an established principle that the right to giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it" (*Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 37). This, of course, leads to the conclusion that:

> "Only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation [of a Security Council resolution] in the true sense." (Michael C. Wood, "The interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 82.)

It is equally obvious that:

> "The I.C.J. and other international tribunals (including those on Yugoslavia and Rwanda) may have to interpret SCRs [Security Council resolutions] for the purpose of giving effect to what the Council has decided." *(Ibid.*, p. 85.)

In the present case, however, the Court is not interpreting resolution 1244 for the purpose of giving effect to what the Council has decided. The Council has not decided anything on the subject of the UDI. The Council has not even acknowledged the issuance of the UDI. The terms of resolution 1244 have remained unaltered since the UDI was adopted (see paragraphs 91 and 92 of the Advisory Opinion).

9. It must be borne in mind that Security Council resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244 — a determination central to the régime established for Kosovo by the Security Council — without a request from the Council, it substitutes itself for the Security Council.

10. In some ways, the situation faced by the Court in the present case is similar to that which confronted it in respect of the Federal Republic of Yugoslavia's (FRY) membership in the United Nations, prior to its admission in 2000. The Court, when considering, in 1993 and 1996, the *Bosnia and Herzegovina* v. *Yugoslavia* case in incidental proceedings, refrained from interpreting the relevant resolutions of the General Assembly and the Security Council in order to make a determination as to whether or not the FRY was a Member of the United Nations and *ipso facto* party to the Statute of the Court. It confined itself to the observation that the solution adopted in the United Nations on the question of the continuation of the membership of the Socialist Federal Republic of Yugoslavia (SFRY) was "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The Court did not address this question in its 1996 Judgment on the preliminary objections (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*). The Court was clearly not authorized to make a determination on the issue of the membership of the FRY in the United Nations and it did not do so, although this was a question of *jus standi*. Only after the Security Council and the General Assembly brought clarity to the situation by admitting the FRY to the United Nations as a new Member did the Court, in the *Legality of Use of Force* cases in 2004, come to the conclusion that the FRY was

not a Member of the United Nations or party to the Statute prior to its admission to the United Nations in 2000. The Court observed that

> "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 310-311, para. 79.)

11. Had the Court made this determination in 1993, 1996 or 1999, when it considered the request for the indication of provisional measures in the *Legality of Use of Force* cases, it would have both jeopardized the integrity of its judicial function and compromised its role as a principal organ of the United Nations.

This is precisely what is at stake in the present case. Therefore, the Court's decision to answer the question is as erroneous as it is regrettable.

12. Now, however reluctantly, I will have to address the majority's attempt to interpret Security Council resolution 1244 with respect to the UDI. Unfortunately, in the process of doing so, the majority has drawn some conclusions, which simply cannot be right.

13. One of these is finding that resolution 1244, which had the overarching goal of bringing about "a political solution to the Kosovo crisis" (resolution 1244, operative paragraph 1), did not establish binding obligations for the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). The Security Council cannot be accused of such an omission, which would have rendered the entire process initiated by resolution 1244 unworkable. The Permanent Representative of the United Kingdom stated the obvious at the time of the adoption of resolution 1244:

> "This resolution applies also *in full* to the Kosovo Albanians, requiring them to play their full part in the restoration of normal life to Kosovo and in the creation of democratic, self-governing institutions. *The Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution*, in particular to demilitarize the Kosovo Liberation Army (KLA) and other armed groups." (Statement by the Permanent Representative of the United Kingdom; United Nations doc. S/PV.4011, 10 June 1999, p. 18; emphasis added.)

14. No less striking is the Court's finding to the effect that "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" envisaged in resolution 1244 (resolution 1244, operative paragraph 11 *(e)*), can be terminated by a unilateral action by the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). In other words, the Security Council, in the view of the majority, has created a giant loophole in the régime it established under resolution 1244 by allowing for a

unilateral "political settlement" of the final status issue. Such an approach, had it indeed been taken by the Council, would have rendered any negotiation on the final status meaningless. Obviously, that was not what the Security Council intended when adopting and implementing resolution 1244. It is useful to recall that operative paragraph 11 *(e)* of resolution 1244 refers to the Rambouillet accords which provide that:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's [Belgrade and Prishtina] efforts regarding the implementation of this Agreement, and the Helsinki Final Act . . ." (United Nations doc. S/1999/648, 7 June 1999, p. 85.)

By no stretch of imagination can a "unilateral settlement" be read into this clear policy statement endorsed by the Security Council in its resolution 1244.

The subsequent practice of the Security Council in respect of resolution 1244 is equally clear. When the process for determining Kosovo's final status was initiated in 2005, the Members of the Security Council attached to the letter from its President to the Secretary-General, "for [his] reference", the Guiding principles for a Settlement of the Status of Kosovo agreed by the Contact Group (composed of France, Germany, Italy, Russia, the United Kingdom and the United States). The Guiding Principles stated in no ambiguous terms that "*[a]ny solution that is unilateral* or results from the use of force *would be unacceptable*" and that "[t]he final decision of the status of Kosovo should be endorsed by the Security Council" (Guiding Principles, annexed to the letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709; emphasis added).

15. Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework:

> "the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established for the interim phase] but, rather, set out to adopt a measure [the UDI] the significance and effects of which would lie outside that order" (Advisory Opinion, paragraph 105).

The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it.

16. The majority's version of resolution 1244 is untenable. Moreover, the Court's treatment of a Security Council decision adopted under Chapter VII of the United Nations Charter shows that it has failed "its own responsibilities in the maintenance of [international] peace and security under the Charter and the Statute of the Court" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 18).

17. There is also a problem with the Court's interpretation of general international law. According to the Advisory Opinion, "general international law contains no applicable prohibition of declarations of independence" (paragraph 84). This is a misleading statement which, unfortunately, may have an inflammatory effect. General international law simply does not address the issuance of declarations of independence, because

> "declarations of independence do not 'create' or constitute States under international law. It is not the issuance of such declarations that satisfies the factual requirements, under international law, for statehood or recognition. Under international law, such declarations do not constitute the legal basis for statehood or recognition." (CR 2009/31, p. 46 (Fife, Norway).)

Declarations of independence may become relevant in terms of general international law only when considered together with the underlying claim for statehood and independence. However, the question posed by the General Assembly "is narrow and specific" (Advisory Opinion, paragraph 51). "In particular, it does not ask whether or not Kosovo has achieved statehood." *(Ibid.)* Therefore, the question as to the legality of the UDI simply cannot be answered from the point of view of general international law. The only law applicable for the purpose of answering the question posed by the General Assembly is the *lex specialis* created by Security Council resolution 1244.

18. In conclusion, it should be said that the purport and scope of the Advisory Opinion is as narrow and specific as the question it answers. The Opinion does not deal with the legal consequences of the UDI. It does not pronounce on the final status of Kosovo. The Court makes it clear that it

> "does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly" (Advisory Opinion, paragraph 51).

The Court also notes that

> "[d]ebates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession' . . . concern the right to separate from a State . . . and that issue is beyond the scope of the question posed by the General Assembly" (Advisory Opinion, paragraph 83).

In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety (see paragraphs 91 and 92 of the Advisory Opinion). This means that "a political process designed to determine Kosovo's future status" envisaged in this resolution (para. 11 *(e)*) has not run its course and that a final status settlement is yet to be endorsed by the Security Council.

(Signed) Leonid SKOTNIKOV.

[Original: English]

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

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I. *Prolegomena*

1. My vote is in favour of the adoption of the present Advisory Opinion of the International Court of Justice (ICJ) on *Accordance with International Law of Kosovo's Declaration of Independence*, for having concurred with the conclusions the Court has reached, set forth in the *dispositif*. As I have arrived at the same conclusions on the basis of a reasoning distinct from that of the Court, I feel obliged to lay on the records the foundations of my own personal position on the matter at issue. To that end, I begin by addressing the preliminary questions of jurisdiction and judicial propriety, with attention turned to the preponderant humanitarian aspects of the question put to the Court, and to its duty to exercise its advisory function, without attributing to so-called judicial "discretion" a dimension which it does not have. Next, I draw attention to the need to proceed to a most careful examination of the factual background and context of the question put to the Court by the U.N. General Assembly.

2. My following line of reflections is directed to the advent of international organizations and the recurring and growing attention dispensed to the needs and aspirations of the "people" or the "population" (in the mandates system under the League of Nations, in the trusteeship system under the United Nations, and in contemporary U.N. experiments of international territorial administration). My next set of considerations (in parts V and VI of the present Separate Opinion) propounds an essentially humanist outlook of the treatment of peoples under the law of nations, from a historical as well as a deontological perspectives. I then proceed to an examination (in part VII) - eluded by the Court in the present Advisory Opinion — of the grave concern expressed by the United Nations *as a whole* with the humanitarian tragedy in Kosovo.

3. After recalling the principle *ex injuria jus non oritur*, I move on to an examination (in part IX) of the important aspect of the conditions of living of the population in Kosovo (as from 1989), on the basis of the submissions adduced by participants in the present advisory proceedings before the Court, in their written and oral phases. I also recall the judicial recognition, and further evidence, of the atrocities perpetrated in Kosovo (in the decade 1989-1999), and ascribe a central position to the sufferings of the people, pursuant to the people-centered outlook in contemporary international law. I then turn to the consideration of territorial integrity in the framework of the humane ends of the State, to the overcoming of the inter-State paradigm in contemporary international law, to the overriding importance of the fundamental principles of humanity, and of equality and non-discrimination, and to a comprehensive conception of the incidence of *jus cogens*. The way will then be paved for the presentation of my final considerations.

II. Considerations on Preliminary Questions of Jurisdiction and Judicial Propriety

1. The Court's Jurisdiction, with Attention on the Preponderant *Humanitarian* Aspects

4. First of all, the Court's jurisdiction to deliver the present Advisory Opinion is, in my view, established beyond any doubt, on the basis of Article 65(1) of its Statute, whereby the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". Such conditions have been acknowledged in the case-law of the Court[1]. It is for the ICJ, as master of its own jurisdiction, to satisfy itself that the request for an Advisory Opinion comes from an organ endowed with competence to make it; in the case of the General Assembly, it is so authorized by Article 96(1) of the U.N. Charter, to request an Advisory Opinion of the ICJ

[1] Cf., e.g., ICJ, Advisory Opinion on the Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal, 1982, para. 21.

on "any legal question". In its case-law, the Court has at times given indications as to the relationship between the object of the requests at issue and the activities of the General Assembly[2].

5. Article 10 of the U.N. Charter confers upon the General Assembly competence to deal with "any questions or any matters" within the scope of the Charter, and Article 11(2) specifically endows it with competence discuss "questions relating to the maintenance of international peace and security brought before it". The question put to the Court by General Assembly resolution 63/3, adopted on 08 October 2008, pertains to the scope of activities of the General Assembly, which, like the Security Council, has been dealing with the situation in Kosovo for over a decade (cf. *infra*)[3]. The main point that may be raised here pertains to Article 12(1) of the U.N. Charter, which states that "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".

6. In any case, a request for an Advisory Opinion is not in itself a "recommendation" by the General Assembly with regard to a "dispute or situation". Under Article 24 of the Charter, the Security Council has "primary responsibility for the maintenance of international peace and security"[4]. Yet, Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the U.N. Charter, to "recommend measures for the peaceful adjustment" of various situations. The ICJ itself has lately pointed out[5], as to the interpretation of Article 12 of the U.N. Charter, that in recent years there has been an "increasing tendency" for the General Assembly and the Security Council to deal "in parallel" with the same matter concerning the maintenance of international peace and security: while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, *considering also their humanitarian, social and economic aspects*.

7. The General Assembly has developed the practice of making recommendations on issues which the Security Council has also been dealing with; U.N. member States have not objected to such practice[6], nor has the Security Council opposed it. This has been the "accepted practice" of the General Assembly, as it has lately evolved, being consistent with Article 12(1) of the U.N. Charter. By adopting, on 08 October 2008, resolution 63/3, seeking an Advisory Opinion from the ICJ relating to the declaration of independence by the

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[2]ICJ, Advisory Opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1950) p. 70; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, paras. 11-12; ICJ, Advisory Opinion, on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, paras. 16 and 25.

[3]In respect of the situation in Kosovo, in addition to the main course of action taken up by the Security Council, the role of the General Assembly includes taking decisions - with the advice of its Vth Committee - on the budget of UNMIK. And the responsibilities of the Secretary-General include the support of the mandate of UNMIK.

[4]It can thus, in that regard, impose on States an "explicit obligation of compliance" if, for example, it issues "an order or command" under Chapter VII, and it can, to that end, "require enforcement by coercive action"; cf. ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 163.

[5]Cf. ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, 2004, paras. 27-28.

[6]Cf. United Nations Juridical Yearbook (1964), pp. 228 and 237.

authorities of Kosovo, the General Assembly has not acted *ultra vires* in respect of Article 12(1) of the U.N. Charter: it was fully entitled to do so, in the faithful exercise of its functions[7] under the U.N. Charter.

8. The remaining aspect concerning the Court's jurisdiction is whether the General Assembly's request relates to a "*legal question*" within the meaning of the U.N. Charter and the ICJ Statute. On this particular point, the ICJ has already indicated that questions "framed in terms of law" and raising "problems of international law" are "by their very nature susceptible of a reply based on law" and appear to be "questions of a legal character"[8]. It is immaterial if the legal question put to the Court, for the exercise of its advisory function, discloses also political aspects. It could hardly be doubted that the question submitted by the General Assembly to the ICJ for an Advisory Opinion is a legal one, relating as it is to the accordance with *international law* of the declaration of independence by the authorities of Kosovo. In its *jurisprudence constante*, the ICJ has clarified that a legal question may also reveal political aspects, "as, in the nature of things, is the case with so many questions which arise in international life"; this "does not suffice to deprive it of its character as a `legal question' and `to deprive the Court of a competence expressly conferred on it by its Statute'"[9].

9. The ICJ has made it clear that it cannot attribute a political character to a request for an Advisory Opinion which invites it to undertake an "essentially judicial task"[10] concerning the scope of obligations imposed by international law[11], namely, an assessment of "the legality of the possible conduct of States" in respect of obligations imposed upon them by international law[12]. Since the earlier years of the ICJ, it has been clarified that the old distinction between so-called "legal" and "political" questions does not stand, as there are no questions which, by their "intrinsic nature", may be termed as essentially "legal" or "political"; such qualifications pertain rather to the means of resolution of the questions at issue[13], whether "legal" (judicial), or otherwise. It is thus somewhat surprising to see this point being persistently raised before the ICJ along the years without consistency.

10. In the light of the aforementioned, it can be concluded that the present request by the General Assembly, by means of its resolution 63/3 of 08.10.2008, for an Advisory Opinion by the ICJ, fulfils the

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[7]On this particular point, the ICJ has already indicated that questions "framed in terms of law" and raising "problems of international law" are "by their very nature susceptible of a reply based on law" and appear to be "questions of a legal character"; ICJ, Advisory Opinion on Western Sahara, 1975, para. 15; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 11.

[8]ICJ, Advisory Opinion on Western Sahara, 1975, para. 15; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 11.

[9]ICJ, Advisory Opinion on Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal, 1973, para. 14; ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, para. 13.

[10]ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155.

[11]Cf. ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 41.

[12]Cf. ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, 1948, pp. 61-62; ICJ, Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, 1950, pp. 6-7; ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155. And cf. also ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, para. 13; ICJ, Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980, para. 33.

[13]Cf. M. Vaucher, Le problème de la justiciabilité et de la non-justiciabilité en droit international des différends dits "politiques" ou "non-juridiques" et les notions de compétence exclusive et de compétence nationale, Paris, Pédone, 1951, pp. 3-243.

requirements of Article 96(1) of the U.N. Charter and of Article 65 of the Statute of the Court, in respect of both the competence of the requesting organ (the General Assembly) and of the substance of the request, and discloses the nature of a legal question. This suffices to determine the issue of the Court's jurisdiction. Furthermore, there is no element raised in the course of the present advisory proceedings that could lead the Court to conclude otherwise.

11. Accordingly, I concur with the Court's view that it has jurisdiction to deliver the requested Advisory Opinion. This latter should be attentive to the broader view of the consideration of issues pursued by the General Assembly (cf. *supra*), focusing on the *preponderant humanitarian aspects* surrounding the conformity or otherwise with international law of the declaration of independence at issue. This requires a careful consideration by the Court of the *factual complex* of the request lodged with it (cf. *infra*), so as to avoid an aseptic reasoning in the Advisory Opinion.

12. This is an aspect in respect of which my reasoning differs from that of the Court. The consideration of the *factual complex* is of considerable importance, as declarations of independence are not proclaimed in a social *vacuum*, and require addressing at least its immediate *causes*. This is a point of far greater importance than the usual arguments concerning so-called judicial "discretion", dealt at length by the Court in the present Advisory Opinion. This argument has been repeatedly raised before this Court, in its practice as to the exercise of its advisory jurisdiction. This point deserved no more than a brief review of the Court's *jurisprudence constante* on it, so as to concentrate attention on other points that are of far greater relevance, such as the factual background of the question but to the Court by the General Assembly.

2. Alleged Judicial "Discretion" and the Court's Duty to Exercise its Advisory Function

13. The second line of considerations at this preliminary stage, pertaining to judicial "discretion" (rather than propriety), has been brought to the fore by certain arguments adduced by some participants, in the course of the present proceedings. Such arguments tried to persuade the Court that it should nevertheless decline, in the exercise of its discretionary power, to render the Advisory Opinion requested by the General Assembly, either because the request concerns "matters essentially within the domestic jurisdiction of a State" (under Article 2(7) of the U.N. Charter); or because the procedure was allegedly being used primarily to further the interests of individual States rather than that of the requesting organ; or because the Court's Advisory Opinion would lack any useful purpose; or because the Court's Opinion would arguably have adverse effects on peace and security in the region; or because that there is no consent of Kosovo to the jurisdiction of the Court; or else because it would be allegedly politically inappropriate for the Court to deliver the Advisory Opinion. I find all these arguments wholly unconvincing.

14. To start with, the ICJ itself observed, in an Advisory Opinion delivered six decades ago, that Article 65 of its Statute gives it "the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request"[14]; it further warned that "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in

[14]ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950, p. 72.

principle, should not be refused"[15]. In accordance with its own *jurisprudence constante*, only "compelling reasons" could lead the ICJ to such refusal[16].

15. As to the argument of domestic jurisdiction (*supra*), already in the case of the *Nationality Decrees in Tunis and Morocco* (1923), the former Permanent Court of International Justice (PCIJ) pondered that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations" (pp. 23-24). Ever since, in their constant practice, in the line of this *obiter dictum* of the PCIJ, both the U.N. main organs and U.N. member States have themselves acknowledged the gradual erosion of the plea of domestic jurisdiction under the U.N. Charter.

16. This has also been reckoned in international legal writing on this particular point. Thus, it was pondered, 35 years ago, that the fact that a State raising an objection on the ground of domestic jurisdiction could not impede the inclusion of the matter into the agenda of the international organ seized of it and its discussion at international level, afforded evidence for the view that the reserved domain of States was already undergoing a continuing process of reduction. Domestic jurisdiction in this context becomes a *residuum* of discretionary authority left by international law within the reserved domain of States[17]. Two decades later, it was reasserted that Article 2(7) of the U.N. Charter was inapplicable in so far as the principle of self-determination was concerned, linked to the consideration of human rights issues, thus removed from the domain of domestic jurisdiction[18].

17. In fact, the ICJ itself has stated that "[t]he purpose of the Court's advisory opinion is not to settle – at least directly - disputes between States, but to offer legal advice to the organs and institutions requesting the opinion"[19]. The U.N. practice with regard to Kosovo's humanitarian crisis illustrates the widespread agreement that the powers of the main U.N. organs (in particular the Security Council and the General Assembly) to initiate and undertake measures in order to secure the maintenance of international peace and security, are rather broad, - and cannot be restrained by pleas of domestic jurisdiction of individual States. This being so, the ICJ, as "the principal judicial organ of the United Nations" (Article 92 of the U.N. Charter), cannot accept the plea of domestic jurisdiction as a reason to decline to exercise its advisory function, and this applies to the present request for an Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*.

18. Another argument has been raised, by some participants in the present advisory proceedings, whereby the advisory procedure is allegedly being used primarily to further the interests of individual States rather than the concerns of the General Assembly as the requesting U.N. organ. A handful of participants

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[15] *Ibid.*, p. 71.

[16] ICJ, Advisory Opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, 1956, p. 86; ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155; Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971, p. 27; ICJ, Advisory Opinion on the Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal, 1973, p. 183; ICJ, Advisory Opinion on Western Sahara, 1975, p. 21; ICJ, Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989, p. 191; ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, p. 235.

[17] A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 International and Comparative Law Quarterly (1976) pp. 713-765.

[18] A. Cassese, Self-Determination of Peoples – A Legal Reappraisal, Cambridge, University Press, 1995, pp. 174 et seq.

[19] ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 15; ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, 1950, p. 71.

further argued that, given the close voting in the adoption of resolution 63/3 of the General Assembly, the ICJ would have to be extremely careful in delivering the Advisory Opinion, if at all; in their view, extreme restraint was required from the ICJ. In my perception, these arguments beg the question.

19. All these considerations were to have been born in mind in the course of the discussion of the draft resolution of the General Assembly[20], when all U.N. member States had an opportunity to express their views in support or against the adoption of such draft resolution. The proposal for inclusion of the item in the agenda of the General Assembly was originally advanced by Serbia, and all U.N. member States had a chance to make their views known in the consideration of this agenda item. The circumstances of the approval of the draft resolution in a rather close or divided voting are, in my view, immaterial.

20. Resolution 63/3 was adopted on behalf of the U.N. General Assembly, and not of only those States which voted in favour of it. This ensues from the international legal personality of the United Nations, which is endowed with a *volonté* of its own, surely distinct from the sum of *volontés* of its member States, or of some of them (those which vote in favour of a resolution of one of its main organs). In the *cas d'espèce*, U.N. member States considered the matter in the General Assembly, and *this latter*, as one the main organs of the United Nations, decided to make of the issue of Kosovo's declaration of independence one of "United Nations concern".

21. The ICJ should thus proceed with care, - as it of course did, - but without feeling inhibited to deliver the present Advisory Opinion. It is not for the Court to dwell upon the circumstances of the political debate prior to the adoption of General Assembly resolution 63/3(2008). The ICJ itself has warned that "the opinion of the Court is given not to States, but to the organ which is entitled to request it"[21]. The international community expects that the Court acts at the height of the responsibilities incumbent upon it, without succumbing to apprehensions or fears, in face of apparent sensitivities of some States. It is incumbent upon the Court to say what the Law is (*juris dictio*)[22].

22. In any case, it is for the Court itself to assess the consequences of its decision to deliver an Advisory Opinion, bearing in mind that it cannot at all abstain itself from the exercise of its advisory function of *saying what the Law is* (*juris dictio*). After all, the ICJ itself pointed out, six decades ago, that, to provide a proper answer to a request for an Advisory Opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused"[23].

23. Accordingly, the argument of a couple of participants in the present advisory proceedings to the effect that the Court's Advisory Opinion would lack a useful purpose, appears to me wholly unfounded. The same applies to the alleged lack of "practical effect" of the Court's Opinion: this allegation simply begs the

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[20]U.N. doc. A/63/L.2.

[21].ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950, p. 71.

[22]The ICJ has, on various occasions, pointed out that it "may give an advisory opinion on any legal question, abstract or otherwise". ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, 1948, p. 61; ICJ, Advisory Opinion on Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, 1954, p. 51; ICJ, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971, para. 40; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 14; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, 2004, para. 40.

[23]ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania - First Phase, 1950, p. 71.

question. The Court's *jurisprudence constante* on the point at issue could be recalled in this connection[24]. In the *cas d'espèce*, it is the task of the Court to provide an Opinion on the question of the accordance with international law of Kosovo's declaration of independence; and it is for the General Assembly to draw its own conclusions, from the Court's Opinion, and to apply them to its further treatment of the situation in Kosovo. In proceeding in this way, the ICJ is contributing to the *rule of law* at international level, which, ever since the 2005 U.N World Summit has been attracting increasing interest and attention, and since 2006 has become an important agenda item ("*The Rule of Law at the National and International Levels*") of the U.N. General Assembly[25].

24. The next argument, with an apparent bearing on judicial "discretion" or propriety, whereby the Court's Opinion would arguably have "adverse effects on peace and security" in the region, likewise begs the question. There is nothing new under the sun, and the Court itself has already answered arguments of the kind in previous Advisory Opinions. For instance, in its Advisory Opinion on the *Threat or Use of Nuclear Weapons* (1996), the ICJ stated:

> "It has (...) been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any Opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the Opinion is a matter of appreciation" (para. 17)[26].

25. It is not the Court's business to speculate on eventual effects of its Advisory Opinions; in my view, it is rather for the Court to contribute, in the faithful exercise of its advisory function, to the *prevalence of the rule of law* in the conduction of international relations. This may well assist in reducing the tension and the political controversy in the region at issue. In the more distant past, there was a trend of opinion that favoured wide discretion on the part of the Hague Court to deliver an Advisory Opinion or not; it was followed by another trend of opinion which accepted that discretion, but only exceptionally and in face of "compelling reasons" (*raisons décisives*). A more enlightened trend of opinion discards discretion, accepting only inadmissibility to protect judicial integrity[27].

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[24]Thus, in its Advisory Opinion on the Western Sahara (1975), the ICJ pondered that nothing in the U.N. Charter, or in its Statute, limited the competence of the General Assembly to request an Advisory Opinion, or that of its own to give an Opinion, on legal questions relating to existing rights or obligations (para. 18). The Opinion would provide the General Assembly with "elements of a legal character relevant to its further treatment" of the subject-matter at issue (para. 32). Earlier on, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), the ICJ observed that the object of that request for an Opinion was "to guide the United Nations in respect of its own action" (p. 19). And half a decade ago, the ICJ stressed, as it clearly ensued from its jurisprudence constante, that "Advisory Opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action"; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 59.

[25]Cf. U.N. General Assembly resolution 61/39, of 18.12.2006; U.N. General Assembly resolution 62/70, of 06.12.2007; U.N. General Assembly resolution 63/128, of 11.12.2008; U.N. General Assembly resolution 64/116, of 16.12.2009.

[26]Cf. also ICJ, Advisory Opinion on the Western Sahara, 1975, para. 73.

[27]Cf. R. Kolb, "De la prétendue discrétion de la Court Internationale de Justice de refuser de donner un avis consultatif", in The International Legal System in Quest of Equity and Universality – Liber Amicorum G. Abi-Saab (eds. L. Boisson de Chazournes and V. Gowlland-Debbas), The Hague, Nijhoff, 2001, pp. 614-618, and cf. pp. 619-627.

26. The Court seems to have indulged into an unnecessary confusion in paragraph 29 of the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, in regrettably admitting to self-limit its advisory function, and in ascribing to so-called "discretion" a dimension that it does not have. It has confused discretion with judicial propriety, and it has failed to stress the proactive posture that it has rightly adopted in the United Nations era, in the exercise of its advisory function, as the principal judicial organ of the United Nations (Article 92 of the U.N. Charter), and as the ultimate guardian of the prevalence of the rule of law in the conduction of international relations[28]. By the same token, it is somewhat disquieting to find, in the unfortunate language of paragraph 29, that the ghost of *Eastern Carelia* seems, like phoenix, to have arisen from the ashes...

27. The Court's advisory function is not a simple faculty, that it may utilize at its free discretion: it is a *function*, of the utmost importance ultimately for the international community as a whole, of the principal judicial organ of the United Nations. Discretion is for a political organ, like the General Assembly or the Security Council, to exercise, also when deciding to request an Advisory Opinion to the ICJ. This latter, when seized of a matter, - either a request for an Advisory Opinion, or a contentious case, - has a duty to perform faithfully its judicial functions, either in advisory matters or in respect of contentious cases. It is not for the Court to indulge in an appreciation of the opportunity of an Advisory Opinion, and it is surprising to me that the Court should dispense so much attention to this issue in the present Advisory Opinion (paragraphs 29-48), to the point of singling out technicalities (in paragraphs 36 and 39, as to the respective roles and faculties of the Security Council and the General Assembly) and of eluding a careful consideration of the factual background (cf. *infra*) of the *grave humanitarian crisis in Kosovo*, brought to its attention by several participants in the course of the written and oral phases of the present advisory proceedings.

28. After all, ours is the age of the reassuring multiplication of international tribunals, bearing witness of the acknowledgement of the primacy of Law over force. Ours is the age of the "jurisdictionalisation" of international law and relations, bearing witness of the improvements in the modalities of peaceful settlement of disputes. Ours is the age of the *expansion of international jurisdiction*, bearing witness of the advances of the idea of an objective justice. Ours is the age of an ever-increasing attention to the advances of the *rule of law* at both national and international levels, a cause which the United Nations as a whole is now committed with, particularly from 2006 onwards (cf. *supra*). To invoke and to insist on "discretion", - rather discretionally, - seems to me to overlook, if not to try to obstruct, the course of evolution of the judicial function in contemporary international law. The awareness of the contemporary and reassuring phenomenon of jurisdictionalisation has fortunately prevailed at the end over undue politicization, underlining certain arguments examined by the Court, which should have been promptly discarded by it.

29. Turning to another related aspect, it seems furthermore clear to me that the ICJ is fully entitled, if it so deems fit, to reformulate the question put to it by the request for an Advisory Opinion, so as to give it more clarity. Thus, the alleged lack of clarity or certainty in the drafting of a question cannot be invoked so as to deprive the Court of its jurisdiction. Quite on the contrary, any uncertainty may require clarification or rephrasing by the Court itself. In fact, along the decades, both the PCIJ and the ICJ have repeatedly observed that the wording of a request for an Advisory Opinion did not accurately state the question on which the Court's Opinion was being sought[29], or else did not correspond to the "true legal question" under

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[28] In its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), the ICJ recalled that "[t]he present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. (...) On only one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (Status of Eastern Carelia, Advisory Opinion, 1923)" (para. 44).

[29] Cf., e.g., PCIJ, Advisory Opinion on the Interpretation of the Greco-Turkish Agreement of 01.12.1926, 1928, pp. 14-16.

consideration[30]. In one particular instance, the ICJ noted that the question put to it was, "on the face of it, at once infelicitously expressed and vague"[31].

30. Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put[32]; and it has accordingly deemed it fit to "identify the existing principles and rules", to interpret them and to apply them, thus offering a reply to "the question posed based on law"[33]. This disposes of the wholly unconvincing – if not inappropriate – argument that it would allegedly be "politically inappropriate" for the ICJ to deliver the present Advisory Opinion. Such an argument should simply not be raised before "the principal *judicial* organ of the United Nations" (Article 92 of the U.N. Charter), which cannot attribute a political character to a request which is supposed to invite it to undertake an essentially judicial task[34]. The ICJ itself has pondered, in this respect, that

> "In institutions in which political considerations are prominent, it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate"[35].

31. Yet, another argument of the kind has been raised in the course of the present advisory proceedings, namely, the lack of consent of Kosovo to the jurisdiction of the Court, allegedly affecting this latter as a matter of judicial propriety: the allegation was that the ICJ should refrain from exercising its jurisdiction in the *cas d'espèce*, because the General Assembly request concerns arguably a bilateral dispute between Kosovo and Serbia in respect of which Kosovo has not consented to the exercise of that jurisdiction. This argument also appears, in my view, unpersuasive and groundless.

32. As widely known, consent is a precondition for the exercise of the Court's *contentious*, not advisory, function. And it could not be otherwise, as Advisory Opinions are intended for the orientation or guidance of the United Nations and its organs. The ICJ itself has clarified this aspect, six decades ago, it its celebrated Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*First Phase*, 1950); in its own words,

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action

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[30]ICJ, Advisory Opinion on the Interpretation of the Agreement of 25.03.1951 between the WHO and Egypt, 1980, paras. 34-36.

[31]ICJ, Advisory Opinion on the Application for Review of Judgment n. 273 of the U.N. Administrative Tribunal, 1982, para. 46.

[32]Cf., in addition to the aforementioned three Advisory Opinions, also the ICJ's Advisory Opinion on the Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956, p. 25; and the ICJ's Advisory Opinion on Certain Expenses of the United Nations, 1962, pp. 157-162.

[33]ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 13; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 38.

[34]ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155.

[35]ICJ, Advisory Opinion on the Interpretation of the Agreement of 25.03.1951 between the WHO and Egypt, 1980, p. 87, para. 33.

it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court (...), in principle, should not be refused" (p. 71)[36].

In the present instance, the object of the request for an Advisory Opinion of the ICJ is to enlighten the General Assembly as to the accordance, or otherwise, with international law, of the declaration of independence of Kosovo by its authorities.

33. It should, furthermore, be kept in mind that, whilst the prior consent of States has always been a hurdle to the exercise of the ICJ's function in settling contentious cases, the opposite occurs in the exercise of its advisory function: it is not at all conditioned by the prior consent of States. Here, the ICJ has a means not only to clarify the questions submitted to it for Advisory Opinions, but also to contribute thereby to the progressive development of International Law. Three remarkable examples to this effect lie in its ground-breaking Advisory Opinions on *Reparation for Injuries Suffered in the Service of the United Nations*, of 1949; on *Reservations to the Convention against Genocide*, of 1951; and on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, of 1971.

34. In sum and conclusion on the preliminary question under consideration, none of the arguments raised in the course of the present advisory proceedings, to try to persuade the ICJ to inhibit itself and to refrain from performing its advisory function in relation to the declaration of independence of Kosovo by its authorities, resists a closer examination. The Court's jurisdiction is fully established in the present matter (cf. *supra*), and there is no "compelling reason" for the Court not to exercise it. There is not much else to be clarified in this respect. My conclusion on this point is that it is not at all for the Court to act "discretionally"; the Court has to perform its advisory function, and ought to deliver, as it has just done, the requested Advisory Opinion, thus fulfilling faithfully its duties as the principal judicial organ of the United Nations. In turn, the Court should have, in my understanding, devoted much more attention than it has done, in the present Advisory Opinion, to the factual context - in particular the factual background - of the matter at issue.

III. The Factual Background and Context of the Question Put to the Court

35. In the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, the Court pursued a minimalist approach to the factual background of the question put to it by the General Assembly, concentrating its attention on Kosovo's declaration of independence of 17.02.2008, and making abstraction of its *causes*, lying in the tragic succession of facts of the prolonged and *grave humanitarian crisis of Kosovo*, which culminated in the adoption of Security Council resolution 1244(1999). As a Member of the Court, I feel obliged to examine that factual background in the present Separate Opinion, given the fact that the Court appears not to have found it necessary to do, namely, to consider carefully Kosovo's *grave humanitarian crisis*. This issue, to which I attach great relevance, was, after all, brought repeatedly to the attention of the Court, in the course of the present advisory proceedings, by several

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[36]The ICJ followed this same reasoning, half a decade ago, in its previous Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004). The Court, after examining "the opposition of certain interested States to the request by the General Assembly" for an Advisory Opinion on the subject-matter at issue, "in the context of issues of judicial propriety", pondered that

> "The object of the request before the Court is to obtain from the Court an Opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The Opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute" (par. 50).

participants, in both the written and oral phases. Perhaps the Court, like human kind, "cannot bear very much reality"[37].

36. In addressing, accordingly, the factual background and the context of the issue submitted by the General Assembly's request to the Court for the present Advisory Opinion, may I draw attention to the fact that, on previous occasions, somewhat distinctly, the ICJ deemed it fit to dwell carefully on the *whole range of facts* which led to the issues brought to its cognizance for the purpose of the requested Advisory Opinions. Thus, in its *célèbre* Advisory Opinion of 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the ICJ stated that

> "It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within he territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.
>
> Under the Charter of the United Nations, the former Mandatory has pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter" (paras. 130-131).

37. Likewise, in its Advisory Opinion of 1975 on the *Western Sahara*, the ICJ examined the matter submitted to its cognizance "in the context of such a territory and such a social and political organization of the population" (para. 89), which led it to a detailed factual examination (paras. 90-107). And, once again, in its Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, before determining the principles and rules of international law which of relevance to assess the legality of the measures taken by Israel, the Court described extensively the works that Israel constructed or was planning to construct, basing itself on the report of the Secretary General. The Advisory Opinion gave ample detail of the effect of those works for the Palestinians (paras. 79-85). And the ICJ added that, for "developments subsequent to the publication" of the report of the Secretary General, it would refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (para. 79).

38. On another occasion, in its Judgment of 19.12.2005 in the case concerning *Armed Activities in the Territory of the Congo* (D.R. Congo *versus* Uganda), the ICJ, after a careful analysis of the factual background of the case and the evidence produced before it, considered that

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[37]To paraphrase Thomas Becket's soliloquy in Canterbury, his premonition in face of the imminence of his sacrifice; cf. T.S. Eliot, "Murder in the Cathedral" (of 1935), in The Complete Poems and Plays 1909-1950, N.Y./London, Harcourt Brace & Co., 1980 [reprint], pp. 208-209.

> "it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories" (para. 211).

In the same 2005 Judgment in the case opposing the D.R. Congo to Uganda, the Court added that "the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict" (para. 221).

39. On yet another occasion, in its Order of 10.07.2002 in the case concerning *Armed Activities in the Territory of the Congo* (New Application: 2002, D.R. Congo *versus* Rwanda), the ICJ, taking account of the factual context, declared itself "deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east Democratic Republic of the Congo resulting from the continued fighting there" (para. 54). Likewise, in its Order on Provisional Measures of 02.06.1999 in the cases concerning the *Legality of Use of Force*, the ICJ noted that it was

> "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia"[38].

On all the aforementioned occasions, as one could well expect, the ICJ did not hesitate to dwell upon the *factual background* of the cases and matters brought into its cognizance, before pronouncing on them.

40. It looks thus rather odd to me that, in the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, the ICJ, after having dedicated - as already pointed out - so much attention to the usual points raised before it, in its practice, on so-called judicial "discretion", - as if apparently attempting to justify the delivery of the present Advisory Opinion, - has given only a brief and cursory attention to the *factual background* of the question put to it by the General Assembly for the purpose of the present Advisory Opinion. Yet, it is precisely the *humanitarian catastrophe* in Kosovo that led to the adoption of Security Council resolution 1244(1999), and the subsequent events, that culminated in the declaration of independence of 17 February 2008 by Kosovo's authorities.

41. I thus consider Kosovo's *humanitarian catastrophe* as deserving of careful attention on the part of the Court, for the purpose of the present Advisory Opinion. The Court should, in my view, have given explicit attention to the factual background and general context of the request of its Opinion. After all, the *grave humanitarian crisis* in Kosovo remained, along the decade 1989-1999, not only a continuing threat to international peace and security, - till the adoption of Security Council resolution 1244(1999) bringing about the U.N.'s international administration of territory, - but also a human tragedy marked by the massive infliction of death, serious injuries of all sorts, and dreadful suffering of the population. The Court should not, in my view, have limited itself, as it did in the present Advisory Opinion, to select only the few reported and instantaneous facts of the circumstances surrounding the declaration of independence by Kosovo's authorities

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[38] ICJ, case concerning Legality of Use of Force (Yugoslavia versus Belgium), Request for the Indication of Interim Measures, ICJ Reports (1999) p. 131, para. 16, and corresponding obiter dicta in the other Legality of Use of Force cases (1999).

on 17.02.2008 and shortly afterwards, making abstraction of the factual background which led to the adoption of Security Council resolution 1244(1999) and, one decade later, of that declaration of independence.

42. In effect, that factual background was to a great extent eluded by the ICJ. In the present Advisory Opinion, it appeared satisfied to concentrate on the events of 2008-2009[39], and, as to the *grave humanitarian crisis* which preceded and accounted for them, it has only briefly and elliptically referred to that crisis in Kosovo, and to the "end to violence and repression"[40] in Kosovo, without any further concrete references to the facts which constituted that prolonged humanitarian crisis. The Court did so, notwithstanding the fact that such factual background was brought to its attention, in detail, by several participants (cf. *infra*), in the course of the present advisory proceedings, during both the written and oral phases.

43. Moreover, in my view, neither Security Council resolution 1244(1999), nor Kosovo's declaration of independence of 17.02.2008, can be properly considered making abstraction of their factual background and context. As to their factual background, it may be recalled that, prior to the irruption and aggravation of the crisis of Kosovo (in the late eighties and early nineties), the constitutional structure of the Socialist Federal Republic of Yugoslavia (SFRY) encompassed six Republics (the Socialist Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two Autonomous Provinces (Kosovo, and Vojvodina, within the Socialist Republic of Serbia). Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, the Socialist Autonomous Province of Kosovo had a "very high degree of autonomy"; in fact, the "broad powers" granted by the 1974 Constitution of the SFRY resulted in a "*de facto* equality" between the aforementioned Republics and Autonomous Provinces[41].

44. In 1989, as a result of changes introduced into the Constitution of the Republic of Serbia, Kosovo's status of Autonomous Province was revoked, what led to much tension and Kosovo's prompt reaction[42], seeking independence. The humanitarian crisis broke up, and the period following 1990 was marked by systematic discriminatory measures, and successive and serious violations of human rights, perpetrated in the earlier years by Serbian authorities against a large segment of the Kosovo Albanian population. In the late nineties the crisis aggravated, with the heinous practice of ethnic cleansing[43] and grave violations of human rights and of international humanitarian law.

45. In the course of the present advisory proceedings (written and oral phases) before this Court, several participants were concerned at characterizing the situation of Kosovo as *sui generis*, or otherwise. Underlying this concern is the underlying preoccupation with the creation of a precedent, whatever its outcome might be. One can hardly escape from the acknowledgement that each case is a case, engulfed as it is in its own history. Some cases may partake the same historical features (such as the decolonization cases of the late sixties, seventies and early eighties), thus conforming a pattern, in the historical development of the *Law of the United Nations*. Others may appear rather unique, also in the framework of the *Law of the United Nations*.

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[39]Sections III-IV of the present Advisory Opinion.

[40]Cf. paragraph 58 of the present Advisory Opinion.

[41]Cf., inter alia , R. Muharremi, "Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited", 33 Review of Central and East European Law (2008) pp. 406-407.

[42]In declaring itself, by its Assembly, in July 1990, an independent Republic within Yugoslavia.

[43]Cf. M. Grmek, M. Gjidara and N. Simac (eds.), Le nettoyage ethnique (Documents historiques sur une idéologie serbe), Paris, Fayard/Éd. Seuil, 2002, pp. 43-353.

46. Thus, the history of each case is to be kept carefully in mind. And each case has a dynamics of its own. Accordingly, Kosovo's declaration of independence of 2008 cannot, in my view, be examined *in abstracto*, or in isolation, but rather in relation to its *factual background* and its historical context, which explain it. In the same line, the 2008 declaration of independence should be considered as a whole. The humanitarian crisis of Kosovo along the decade of 1989-1999 appeared related to the historical process of the dissolution of former Yugoslavia. Its *social facts* resisted successive attempts of peaceful settlement, did not abide by time-limits[44], nor were restrained by deadlines. The history of each case is not limited to the successive attempts of its peaceful settlement: it also comprises its *causes* and *epiphenomena*, which have likewise to be taken carefully into account.

47. Secondly, the grave humanitarian crisis, as it developed in Kosovo along the nineties, was marked by a prolonged pattern of successive crimes against civilians, by grave violations of International Humanitarian Law and of International Human Rights Law, and by the emergence of one of the most horrible crimes of our times, that of *ethnic cleansing*. This latter entered the vocabulary of contemporary International Law through the prompt reaction of the former U.N. Commission on Human Rights, which, as from August 1992, began to utilize the expression in relation specifically to the tragic conflicts that began to plague the former Yugoslavia. From late 1992 onwards, the expression "ethnic cleansing" was to appear systematically in other U.N. documents, including resolutions of the General Assembly and the Security Council.

48. I well remember the prompt repercussions that the news of those crimes had, a couple of hundreds of kilometres away, in Vienna, in the course of the II World Conference on Human Rights in Vienna, where I was working (in June 1993), in its Drafting Committee. The decision that the World Conference had taken not to single out any situation, was promptly abandoned, and reversed, given the horrible news that were arriving from the former Yugoslavia: it became the general feeling that, a U.N. World Conference on Human Rights that would make abstraction of that general situation, would simply lose its *raison d'être*. This explains the adoption of, - besides the 1993 Vienna Declaration and Programme of Action, and the Final Report of the Conference, - of two resolutions, on Bosnia and Herzegovina and on Angola, respectively, both then plagued by armed conflicts.

49. Thirdly, another element characteristic of the humanitarian crisis of Kosovo was the decision taken by the U.N. Security Council 1244 (1999), adopted on 10 June 1999, to place Kosovo under a U.N. transitional international administration - while recognizing Serbia's territorial integrity, - pending a final determination of its future status. Ever since, Kosovo was withdrawn from Serbia's "domestic jurisdiction", having become a matter of legitimate international concern. The *Law of the United Nations* was the one that became applicable to its status, for the purposes of its international administration. The unique character of the situation of Kosovo was pointed out also by the Special Envoy (Mr. M. Ahtisaari, appointed on 14.11.2005) of the U.N. Secretary General, in its *Report* on Kosovo's Future Status: - "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts" (para. 15)[45].

50. Looking back to the *causes* and *epiphenomena* of Kosovo's humanitarian crisis (which the present Advisory Opinion of the Court just briefly refers to, while avoiding any examination whatsoever of the relevant facts which led to it), the deprivation of Kosovo's autonomy (previously secured by the Constitution of 1974) in 1989, paved the way for the cycle of systematic discrimination, utmost violence and atrocities which

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[44]Unlike what the Badinter Commission would have liked to make one believe (having attempted in vain to do so). Cf., on this particular point, P. Radan, The Break-up of Yugoslavia and International Law, London/N.Y., Routledge, 2002, pp. 247-253.

[45]Likewise, the Council of the European Union reiterated, on 18.02.2008, its view that the situation of Kosovo constituted a sui generis case. Along those years, the general picture in the whole region changed remarkably.

victimized large segments of the population of Kosovo, along one decade (1989-1999), leading to the adoption of a series of resolutions by the main political organs of the United Nations, and culminating in the adoption of Security Council resolution 1244(1999).

51. For the examination of a humanitarian crisis such as that of Kosovo, endeavours of its friendly settlement are surely relevant[46], but, in order to move from Security Council resolution 1244(1999) to address Kosovo's declaration of independence of 17.02.2008, one needs to keep in mind the *causes* of the preceding conflict, which lie in the planified, long-standing and brutal repression of large segments of the population of Kosovo (*infra*). Friendly settlement efforts, in my view, cannot thus be approached in a "technical", isolated way, detached from the *causes* of the conflict. It is thus important, as already pointed out, to have clearly in mind the whole context and *factual background* of the question put to the ICJ by the General Assembly for the present Advisory Opinion (cf. *infra*).

52. Before proceeding to an examination of that series of resolutions *altogether* (which the ICJ has likewise avoided doing, concentrating specifically on Security Council resolution 1244(1999)), I deem it necessary to insert the matter into the larger framework of the *Law of the United Nations*. To that end, I shall start by recalling pertinent antecedents linked to the advent of international organizations, - which cannot pass unnoticed here, - in their growing attention to the needs and aspirations of the "people" or the "population".

IV. The Advent of International Organizations and the Growing Attention to the Needs and Aspirations of the "People" or the "Population"

53. The advent of international organizations not only heralded the growing expansion of international legal personality (no longer a monopoly of States), but also shifted attention to the importance of fulfilling the needs and aspirations of people. In this sense, international organizations have contributed to a return to the *droit des gens*, in the framework of the new times, and to a revival of its humanist vision, faithful to the teachings of the "founding fathers" of the law of nations (cf. *infra*). That vision marked its presence in past experiments of the mandates system, under the League of Nations, and of the trusteeship system, under the United Nations, as it does today in the U.N. initiatives of international administration of territory.

1. League of Nations: The Mandates System

54. The mandates system emerged of human conscience, as a reaction to abuses of the past, and in order to put an end to them: the annexation of colonies, the policy of acquisition of territory (as an emanation and assertion of State sovereignty) practiced by the great powers of the epoch, the acquisition and exploitation of natural resources. All such abusive practices used to occur in flagrant and gross disregard to the already adverse conditions of living, and defencelessness, of the native peoples. The reaction to such abuses found expression in Article 22 of the Covenant of the League of Nations, which shifted attention to the peoples to be assisted and protected.

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[46] Efforts and initiatives taken, at distinct stages of the crisis of Kosovo, to arrive at a peace settlement, are of course to be taken into account by the ICJ, together with the causes of the conflict. One may recall, in this connection, as to the endeavours of peace settlement, among others, the negotiations engaged into by the Contact Group (1998-1999), the Accords resulting from the Rambouillet Conference (1999), Security Council resolution 1244 (1999) itself, the Constitutional Framework for Provisional Self-Government of Kosovo (promulgated by the Special Representative of the U.N. Secretary General in May 2001 and with implementation completed by the end of 2003), the Troika talks (2007) the Report on Kosovo's Future of the Special Envoy of U.N. Secretary General (2007). For recent accounts of the successive endeavours of peaceful settlement, cf., e.g., H.H. Perritt Jr., The Road to Independence for Kosovo - A Chronicle of the Ahtisaari Plan, Cambridge, University Press, 2010, pp. 1-278; J. Ker-Lindsay, Kosovo: The Path to Contested Statehood in the Balkans, London/N.Y., I.B. Tauris, 2009, pp. 1-126.

55. Article 22(1) and (2) of the Covenant left it clear that, under the emerging mandates system, the mandatory powers were entrusted with the "well-being and development", and the "tutelage", of the peoples placed thereunder. State sovereignty was alien to the mandates system: it had no incidence on, or application in, its realm. State sovereignty was clearly dissociated from the mandatories duties and responsibilities towards the mandated peoples, as a "sacred trust of civilization", to promote the well-being and development of those peoples.

56. A new relationship was thus created in international law, replacing, in the framework of the mandates system, the old and traditional conception of State sovereignty by the governance of peoples, pursuing their own interests, and training them towards autonomy and self-government. In the thoughtful words of Norman Bentwich in 1930 (then Attorney-General of Palestine, one of the mandated territories),

> "The mandatory is a protector with a conscience and - what is more - with a keeper of his conscience, required to carry on the government according to definite principles, to check the strong and protect the weak, to make no profit and to secure no privilege"[47].

57. In securing the well-being and development of the peoples concerned, mandatory powers were required to assure their freedom of conscience and the free exercise of all religions and forms of worship. The dual nature of mandatory powers became evident, ensuing from Article 22 of the Covenant itself: first, and foremost, they had duties *vis-à-vis* the peoples under guardianship (a personal relationship); and, secondly, they had duties towards the international society (of the epoch) at large, to the League of Nations as supervisor of the mandates system[48], and, ultimately, to humankind as a whole.

58. Yet, like all juridical instruments, mechanisms and institutions, the mandates system was a product of its time. We all live *within* time. It made clear that it was necessary, from them onwards, furthermore, to avoid stigmas of the past, - source of much debate in those days and thereafter, - such as the use of certain terms (like "tutelage", or even "guardianship" itself), and the attempted classification of degrees of civilization (as in the list of mandates A, B and C). In the following experiment of international organizations, already in the League of Nations era, - that of the trusteeship system, - attention became focused on self-determination of peoples.

2. United Nations: The Trusteeship System

59. In the U.N. international trusteeship system, under chapters XII and XIII of the Charters, attention remained focused on the *peoples* concerned. There was, in addition, chapter XI, on non-self-governing territories: thereunder, Article 73 reiterated the notion of "sacred trust", in the protection of the peoples concerned "against abuses", and in the progressive development of their "self-government" pursuant to their "aspirations". As to the trusteeship system itself (chapter XII), Article 76 listed its basic objectives, namely:

> "*(a)* to further international peace and security;
>
> *(b)* to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the

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[47] N. Bentwich, The Mandates System, London, Longmans, 1930, p. 5.

[48] Cf. *ibid.*, pp. 7-9 and 16-20.

freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the independence of the peoples of the world; and

(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice (...)".

60. It ensues from those objectives, from the letter and spirit of their formulation in Article 76 of the U.N. Charter, that the U.N. trusteeship system was devised and put into practice, in line with natural law thinking, in order to secure the welfare of the inhabitants of trust territories, and to move towards their self-government or independence[49]. In fostering the social development of the inhabitants of trust territories, the trusteeship system stimulated the consciousness of their rights; furthermore, it kept in mind the common interests - of present and future generations – of the populations of those territories[50]. Furthermore, it aimed at enabling such populations to achieving the capacity to become independent, in fulfilment of their own aspirations, so as to secure the equality of treatment to everyone[51].

61. This outlook has projected itself into the contemporary U.N. experiments of international administration of territory. The humanist legacy of past experiments of international organizations to present-day U.N. initiatives of international administration of territory (cf. *infra*) cannot pass unnoticed here. Former experiments of the League of Nations (the mandates system) and of the United Nations (the trusteeship system, in addition to the regime of non-self-governing territories), were devised, and put into operation, as human conscience awakened as to the need to do so, in order to put an end to abuses against human beings, and to prevent the recurrence of abuses of the past.

3. International Administration of Territory

62. Territorial administration exercised by international organizations (rather than foreign States) has also historical antecedents: for example, in the League of Nations era, the Free City of Danzig (1920-1939), and the Saar (German Saar Basin, 1920-1935), followed, in the United Nations era, by the U.N. Council for Namibia (established in 1967), and the U.N.-performed administrative functions in Cambodia (1991-1992). Three decades after the creation of the U.N. Council for Namibia, contemporary experiments of U.N. international administration of territory began to pursue likewise a people-centered outlook, in a rather proactive way, to put an end to abuses and to correct mistakes that affected the population[52].

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[49]Cf., to this effect, e.g., C.E. Toussaint, The Trusteeship System of the United Nations, London, Stevens, 1956, pp. 5, 21, 29, 248, 251 and 253.

[50]Cf., to this effect, C.V. Lakshmi-Narayan, Analysis of the Principles and System of International Trusteeship in the Charter (thesis), Genève, Université de Genève/IUHEI, 1951, pp. 131, 133, 139-140, 145 and 153.

[51]Cf., to this effect, Jean Beauté, Le droit de pétition dans les territoires sous tutelle, Paris, LGDJ, 1962, pp. 14-15, and cf. pp. 12-13.

[52]R. Wilde, "From Danzig to East Timor and Beyond: The Role of International Territorial Administration", 95 American Journal of International Law (2001) pp. 586, 592-593, 599-600 and 605.

63. The cases of Kosovo and East Timor serve as pertinent illustrations: the roles of UNMIK and UNTAET have been unique, turned as they have been to the aftermath of *intra-State*, rather than inter-State conflicts[53]. As from the nineties, as well-known, U.N. peace operations began to engage themselves in post-conflict reconstruction[54] and peaceful State-building, as from a people-centered perspective, attentive to the creation and preservation of public participation. This applies even more forcefully in cases (like that of Kosovo) where the population was subjected to successive brutalities, for a prolonged period of time, on the part of the former "sovereign" authorities.

64. Prolonged oppression stresses the pressing need of safeguarding the rights of the inhabitants, and this again brings to the fore the notion of *trusteeship*, this time related to the contemporary experiments of international administration of territory[55]. In the U.N. World Summit of September 2005, the former U.N. Trusteeship Council came indeed to the end of its days, replaced as it was by the U.N. Peacebuilding Commission, but the basic idea of *trusteeship* seems to have survived in the new context[56]. It is thus not surprising to find that, out of a context of utmost violence such as that of Kosovo in the decade of 1989-1999, Security Council resolution 1244(1999) emerged, followed by the goals of self-government and U.N.-supervised independence pursued by the victimized population.

4. The Recurring Concern with the "People" or the "Population"

65. It is not surprising that, in the times of the experiments of territories under mandate or in that of trust territories, considerable attention was dispensed to "*territory*". Yet, the considerable development of international law in our times, assists us, in current-day rethinking of those juridical institutions, to identify an element, in my view, of greater transcendence in those juridical institutions: that of the care with the *conditions of living of the "people" or the "population"*. People and territory, - regarded as two of the constitutive elements of statehood (added to the normative system), - go together; yet, when placed on balance, to paraphrase a Judge of the Hague Court of the past, "it is for the people to determine the destiny of the territory and not the territory the destiny of the people"[57].

66. This leads us to consider a key aspect which was insufficiently singled out in the past, despite its great relevance, and which remains, in my view, of considerable importance in the present, namely, the aforementioned *conditions of living of the population*. People and territory go together, but the *emphasis* is shifted from the status of territory to the needs and aspirations of people. It is this element which, in my perception, provides the common denominator, in an inter-temporal dimension, of the experiments of mandates, trust territories and contemporary international administration of territories. Those juridic l

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[53]M. Bothe and T. Marauhn, "U.N. Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration", in Kosovo and the International Community - A Legal Assessment (ed. C. Tomuschat), The Hague, Kluwer, 2002, pp. 223, 233, 236 and 239, and cf. p. 242.

[54]Cf. B. Boutros-Ghali, An Agenda for Peace (With the New Supplement), 2nd. ed., N.Y., U.N. 1995, pp. 61-64.

[55]T.B. Knudsen, "From UNMIK to Self-Determination? The Puzzle of Kosovo's Future Status", in Kosovo between War and Peace - Nationalism, Peacebuilding and International Trusteeship (eds. T.B. Knudsen and C.B. Laustsen), London, Routledge, 2006, pp. 158-159 and 163-165, and cf. p. 156; and cf. T.B. Knudsen and C.B. Laustsen, "The Politics of International Trusteeship", in *ibid.*, pp. 10 and 16.

[56]Cf., to this effect, R. Wilde, International Territorial Administration - How Trusteeship and the Civilizing Mission Never Went Away, Oxford, University Press, 2008, pp. 321-323, 325, 344-346, 349, 379-380, 382, 384, 386, 399, 415-416, 444 and 459; and cf. also G. Serra, "The International Civil Administration in Kosovo: A Commentary on Some Major Legal Issues", 18 Italian Yearbook of International Law (2008) p. 63.

[57]ICJ, Advisory Opinion on the Western Sahara, ICJ Reports (1975), Separate Opinion of Judge Dillard, p. 122.

institutions, - each one a product of its time, - were conceived and established, ultimately, to address, and respond to, the needs (including of protection) and aspirations of *peoples*, of human beings.

V. Basic Considerations of Humanity in the Treatment of Peoples under the Law of Nations

67. Along the last decades, attempts have thus been made to characterize the role of international organizations in the aforementioned experiments turned to the treatment of the "people" or the "population" (the mandates and trusteeship systems, and the international administration of territory). If a common denominator of such characterization in relation to distinct experiments can be detected, it lies in the basic considerations of humanity which permeates them all. Such considerations go well beyond the classical focus on private law analogies.

1. Private Law Analogies

68. In assessing the growing experience of international organizations with experiments of the kind of the mandates system (in the League of Nations era), and the trusteeship system (in the United Nations era), followed by that of the contemporary international administration of territories, there has been an effort, on the part of expert writing, to situate them in the conceptual universe of Law and identify therein their origins. To this end, there was a tendency, especially in studies by authors of common law formation, to resort to private law analogies, in particular with regard to the mandates and trusteeship systems.

69. In addressing them, most legal scholars appeared satisfied to identify such private law analogies, without feeling the need to go deeper into the *international* legal doctrine of a more distant past[58]. Thus, "mandate" was identified as deriving from the *mandatum*, a consensual contract in Roman law; the beneficiary was a third party. "Trust" and "tutelage" had roots in the *tutela* of Roman law, a sort of guardianship of infants; this disclosed much uniformity in legal systems, as disclosed by the English *trust*, to some extent a descendant of the *fideicomissa* of Roman law (in "fiduciary" relations). In any case, a new relationship was thereby created, in the mandates and trusteeship systems, on the basis of confidence (the "sacred trust", *infra*) and, ultimately, human conscience.

70. What ultimately began to matter was the well-being and human development of the *population*, of the inhabitants of mandated and trust territories. In the infancy of those experiments under international organizations, it was clearly pointed out by Quincy Wright, for example, that mandates - under the League of Nations' mandates system - were thus intended to evade the notion of absolute territorial sovereignty, which became "unsuited" to the international society of the time, and were further intended to give "legal protection" to newly-arisen needs, namely, those of "the mandated peoples", by application of those private law analogies (*supra*); the mandatory, tutor or trustee had "duties rather than rights"[59].

2. The Central Position of Peoples in the Origins of the Law of Nations (*Droit des Gens*)

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[58]For a notable exception, going back to the thinking of the Spanish theologians of the of the XVIth century (F. de Vitoria and B. de Las Casas), cf. R.N. Chowdhuri, International Mandates and Trusteeship Systems - A Comparative Study, The Hague, Nijhoff, 1955, pp. 13, 16-18 and 20-22.

[59]Quincy Wright, Mandates under the League of Nations, Chicago, University of Chicago Press, 1930, pp. 389-390, and cf. pp. 375-378, 382-386 and 387.

71. Yet, however clarifying an analysis of the kind may be (no one would deny it), it would remain incomplete if not accompanied by an examination of the teachings of the so-called "founding fathers" of the law of nations (*le droit des gens*). This latter is remarkable by its essentially humanist outlook, - which is the one I have always espoused. Human conscience soon awakened, and reacted at the news of atrocities perpetrated at international level, in the epoch of formation of the *jus gentium* (already detached from its origins in Roman law), the *droit des gens* (*derecho de gentes*). The attention was turned to the victims, the people victimized by the violence and cruelty of power-holders of the time. Peoples assumed a central position in the early days of the emergence of the *droit des gens*.

72. Thus, as early as in the mid-XVIth century, in his memorable account of the cruel destruction of the *Indias* (1552), Bartolomé de Las Casas, invoking the *recta ratio* and natural law, boldly denounced the massacres and the destruction of the villages, of the inhabitants of the *Indias*, perpetrated with impunity by the colonizers[60]. Despite the fact that the victims were totally innocent[61], not even women and children and elderly persons were spared by the cruelty and violence of those who wanted to dominate them, at the end killing them all; in some regions the whole population was exterminated[62]. The violence was characterized by its inhumanity and extreme cruelty; notwithstanding, injustice prevailed[63]. But the reaction of the *droit des gens* emerged therefrom.

3. The *Civitas Maxima Gentium* in the Vision of the `Founding Fathers' of the Law of Nations

73. The ideal of the *civitas maxima gentium* was soon to be cultivated and propounded in the writings of the so-called "founding fathers" of international law, namely, the *célèbres Relecciones Teológicas* (1538-1539), above all the *De Indis - Relectio Prior*, of Francisco de Vitoria; the treatise *De Legibus ac Deo Legislatore* (1612), of Francisco Suárez; the *De Jure Belli ac Pacis* (1625), of Hugo Grotius; the *De Jure Belli* (1598), of Alberico Gentili; the *De Jure Naturae et Gentium* (1672), of Samuel Pufendorf; and the *Jus Gentium Methodo Scientifica Pertractatum* (1749), of Christian Wolff. At the time of the elaboration and dissemination of the classic works of F. Vitoria and F. Suárez (*supra*), the *jus gentium* had already freed itself from private law origins (of Roman law) to apply itself universally to all human beings[64].

74. As recently recalled, in the conception of the "founding fathers" of the *jus gentium* inspired by the principle of humanity *lato sensu* (which seems somewhat forgotten in our days), the legal order binds everyone (the ones ruled as well as the rulers); the *droit des gens* regulates an international community constituted by human beings socially organized in States and co-extensive with humankind (F. Vitoria); thus conceived, it is solely Law which regulates the relations among members of the universal *societas gentium* (A. Gentili). This latter (*totus orbis*) prevails over the individual will of each State (F. Vitoria). There is thus a *necessary* law of nations, and the *droit des gens* reveals the unity and universality of humankind (F. Suárez). The *raison d'État* has limits, and the State is not an end in itself, but a means to secure the social order pursuant to the right reason, so as to perfect the *societas gentium* which comprises the whole of humankind (H. Grotius). The

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[60]Fray Bartolomé de Las Casas, Brevísima Relación de la Destrucción de las Indias (1552), Barcelona, Ediciones 29, 2004 [reprint], pp. 7, 9, 17, 41, 50 and 72.

[61]*Ibid.*, pp. 7-14.

[62]*Ibid.*, pp. 23, 27 and 45. According to his account, some of the victims were burned alive, and those who survived were enslaved; *ibid.*, pp. 31, 45, 73, 87 and 89.

[63]*Ibid.*, pp. 89-90. Bartolomé de Las Casas asserted that those mass killings and that devastation did harm to the Spanish crown itself, to the Kings of Castilla themselves, and were in breach of all rights; *ibid.*, pp. 41-42.

[64]A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 318-319.

legislator is subject to the natural law of human reason (S. Pufendorf), and individuals, in their association in the State, ought to promote together the common good (C. Wolff)[65].

VI. The Contemporaneity of the '*Droit des Gens*': The Humanist Vision of the International Legal Order

75. Since the times of those writings, the world of course has entirely changed, but human aspirations have remained the same. The advent, along the XXth century, of international organizations (as we came to know them nowadays), has much contributed, in a highly positive way, to put an end to abuses against human beings, and gross violations of human rights and international humanitarian law. The United Nations, in our times, has sought the prevalence of the dictates of the universal juridical conscience, particularly when aiming to secure dignified conditions of living to all peoples, in particular those subjected to oppression.

76. International organizations have contributed to foster an essentially humanist outlook of the earlier experiments of mandates and trusteeship under their supervision, - an outlook which is line with the natural law thinking of the *totus orbis*, or the *civitas maxima gentium*. In that thinking, be it the old *polis*, be it the State, or any other forms of socio-political organization, they were all conceived, and came to exist, for the human person, and not *vice-versa*. International organizations, created by States, have acquired a life of their own, and been faithful to the observance of the principle of humanity *lato sensu*, bringing this latter well beyond the old and strict inter-State dimension. The early experiments of the mandates and trusteeship systems provide clear historical evidence to that effect.

77. Yet, international legal doctrine, obsessed, along the XXth century, with the ideas of State sovereignty and territorial integrity (which are not here in question) to the exclusion of others, was oblivious of the most precious constitutive element of statehood: human beings, the "population" or the "people". The study of statehood *per se*, centered on the State itself without further attention to the people, was carried to extremes by the legal profession. In successive decades, attention was focused, in institutions of learning (mainly Faculties of Law in numerous countries), on the so-called "general theory of the State" (*théorie générale de l'État / teoria general del Estado / teoria geral do Estado / Allgemeine Staatslehre / teoria generale dello Stato*), repeating mechanically and *ad nauseam* certain concepts advanced by authors of times past who had distinct concerns in mind. This uncritical attitude led many to believe that the State was the permanent and final repository of human aspirations and human freedom.

1. The Early Judicial Recognition of Rights of Human Beings and of Peoples

78. The consequences of that indifference to the human factor[66] were devastating. As abuses and atrocities became recurrent, the need began to be felt to turn attention to the conditions of living of the population or the people, to the fulfillment of their needs and aspirations. International juridical conscience took a long time to awake to that. Yet, already in the inter-war period the minorities and mandates systems under the League of Nations were attentive to that. The old Permanent Court of International Justice (PCIJ) gave its own contribution to the rescue of the "population" or the "people". Some of its relevant *obiter dicta* cannot pass unnoticed here, as, eight decades later, they seem to remain endowed with contemporaneity.

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[65] Cf. *ibid.*, pp. 9-14, and cf. pp. 172, 393 and 408.

[66] To paraphrase the title of Graham Greene's insightful novel.

79. Thus, in its Advisory Opinion on the *Greco-Bulgarian Communities* (1930), the PCIJ took the occasion to state that a community is

> "(...) a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other" (p. 21).

80. Half a decade later, the PCIJ, in its Advisory Opinion on *Minority Schools in Albania* (1935), warned that "the idea underlying the treaties for the protection of minorities" was to secure "living peaceably" alongside with the population. To that end, "two things were regarded as particularly necessary", namely:

> "The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements for the preservation of their racial peculiarities, their traditions and their national characteristics.
>
> These two requirements are indeed closely interlocked, for their would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority" (p. 17).

81. The minorities treaty at issue, - the PCIJ added, - aimed at "preventing differences of race, language or religion from becoming a ground of inferiority in law or an obstacle in fact to the exercise of the rights in question" (p. 18). The PCIJ further recalled that, twelve years earlier, in its other Advisory Opinion on *German Settlers in Poland* (1923), it had stated that

> "There must be equality in fact as well as ostensible legal equality in the sense of discrimination in the words of the law" (*cit. in* p. 19).

82. The "principle of identical treatment in law and in fact" was reiterated by the PCIJ in the aforementioned Advisory Opinion on *Minority Schools in Albania* (1935), in the following terms:

> "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact (...). The equality between members of the majority and of the minority must be an effective, genuine equality (...)" (p. 19)[67].

[67] The PCIJ added that "the idea embodied in the expression 'equal right' is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals" (p. 20).

83. It is thus significant that, even well before the 1948 Universal Declaration of Human Rights, the fundamental principle of equality and non-discrimination had found judicial recognition. The Universal Declaration placed the principle in a wider dimension, by taking the individual *qua* individual, *qua* human being, irrespective of being a member of a minority, or an inhabitant of a territory under the mandates system (or, later on, under the trusteeship system). Yet, the formulation of the principle in relation to those pioneering experiments under the League of Nations (the minorities and mandates systems, this latter followed by the trusteeship system under the United Nations), contributed to giving universal expression to equality and non-discrimination. Yet, the principle of equality and non-discrimination was already engraved in human conscience.

84. The Universal Declaration of Human Rights proclaimed it in emphatic terms. Its preamble began by stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (para. 1). It then recalled that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (para. 2). And it further warned, still in its preamble, that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (para. 3). The Universal Declaration then proclaimed, in its Article 1, that

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

85. Already in the early years of the United Nations era, the International Court of Justice (ICJ), in its Advisory Opinion on the *International Status of South-West Africa* (1950), saw it fit to ponder that Article 80(1) of the U.N. Charter purported

> "to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until trusteeship agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ" (pp. 136-137).

Thus, as acknowledged by the ICJ, "the necessity for supervision continues to exist despite the disappearance of the supervisory organ under the mandates system" (p. 136). The "international function of administration" (of mandated territories) aimed at "promoting the well-being and development of the inhabitants"[68].

86. The ICJ saw it fit to recall that the mandates system had been created

> "in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law" (p. 132).

Furthermore, in the view of the ICJ, the rights of States *and peoples* did not lapse automatically on the dissolution of the League of Nations; on the contrary, they were safeguarded "under all circumstances and in all respects, until each territory should be placed under the trusteeship system" (p. 134).

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[68] This being the "sacred trust of civilization" referred to in Article 22 of the Covenant of the League of Nations (p. 133).

87. The ICJ stressed "the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants", and this assumed "particular obligations" in relation to abuses of the past[69]. The ICJ sought to secure the continuity of those obligations. Thus, in the same Advisory Opinion on the *International Status of South-West Africa* (1950), it recalled that the Assembly of the League of Nations, in its Resolution of 18.04.1946, reckoned that chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those declared in Article 22 of the Covenant, in a clear indication that "the supervisory functions exercised by the League would be taken over by the United Nations". The competence of the U.N. General Assembly to exercise such supervision derived from Article 10 of the Charter, which authorized it "to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the members of the United Nations" (p. 137). The U.N. General Assembly, early in its life, began to exercise that competence, and the ICJ found, in that Advisory Opinion of 1950, that the General Assembly was "legally qualified" to do so (p. 137).

2. The Humanist Legacy of Past Experiments to U.N. International Administration of Territory

88. Each juridical institution is the product of its time. Social facts tend to come before the norms, and these latter emerge from legal principles, in order to regulate new forms of inter-individual and social relations. Juridical institutions constitute responses to social needs of their times, including protection. The institutions of mandates (under the League of Nations), of trusteeship (under the United Nations until 2005) and of international administration of territory (by the United Nations, of the kind of the ones evolved in the nineties), are no exception to that.

89. Although the experiences of the mandates and the trusteeship systems belong to the past, are now part of history, this does not mean that lessons cannot be extracted therefrom, for the consideration of new juridical institutions, operating nowadays also in response to social needs, including protection. This amounts to rethinking the juridical institutions of the past, to identify their legacy, of relevance for new social needs. In my own perception, in at least one particular aspect the experiments of the mandates and the trusteeship systems were ahead of their times: that of the access of the inhabitants concerned (of mandated and trust territories) to justice at international level.

90. As attention gradually began to turn into the "population" or the "people" (with the awakening to the human conscience as to their needs of protection), pioneering experiments were devised and placed in operation: in the era of the League of Nations, the minorities and mandates systems, placed under its supervision, and, later on, in the era of the United Nations, the trusteeship system. There can hardly be any doubt that the experiments of mandates (in addition to the minorities system), and of trust territories, aimed at the fulfillment of the needs, and at the empowerment, of the inhabitants of the territories at issue, so as to put an end to abuses of the past. The inhabitants of mandate and trust territories were, furthermore, endowed with the

[69] Such as "slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship"; such obligations represented "the very essence of the sacred trust of civilization" (p. 133).

right of international individual petition[70] (to the Permanent Mandates Commission, to the Minorities Committees, and to the Trusteeship Council, respectively), - heralding the advent of the access of individuals to international instances in order to vindicate their own rights, emanated directly from the *droit des gens*, from the law of nations itself.

91. If we go through the bulk of expert writing on the mandates and the trusteeship systems, especially those who were familiar with the operation of those systems, we detect: *(a)* analogies of private law wherefrom inspiration was drawn for the establishment of those juridical institutions; *(b)* devising of mechanisms of supervision (of territories and mandates and in the trusteeship system), also at international level (recourse to the former Permanent Mandates Commission and the former Trusteeship Council); *(c)* interactions between the domestic and international legal orders; *(d)* classification of units (mandates and trust territories); *(e) modus operandi* of the respective systems.

92. A rethinking of those experiments of mandates and trust territories does not need to go over such aspects, overworked in the past; it is here rather intended to focus on the lessons left for the present and the future. This implies consideration of their *causes*, of what originated those institutions, as well as of their *purposes*, of which goals they purported to attain. Much of the energy - not all of it - spent in devising them was conditioned, perhaps ineluctably, by prevailing notions of their times. Yet, they left a precious lesson for succeeding generations, that cannot be overlooked nowadays.

93. The juridical institutions of mandates, trusteeship and international administration of territories emerged, in succession, from the juridical conscience, to extend protection to those "*peoples*" or "*populations*" who stood - and stand - in need of it, in modern and contemporary history. The respective "territorial" arrangements were the *means* devised in order to achieve that *end*, of protection of "populations" or "peoples". It was not mandates for mandates' sake, it was not trusteeship for trusteeship's sake, and it is not international administration of territory for administration's sake.

94. If we turn to the *causes*, as we ought to, we identify their common purpose: to safeguard the "peoples" or "populations" concerned (irrespective of race, ethnic origin, religious affiliation, or any other trait) from exploitation, abuses and cruelty, and to enable them to be masters of their own destiny in a temporal dimension. In such domain of protection, Law is ineluctably *finaliste*. Those experiments were inspired by the fundamental *principle of humanity* (cf. paras. 196-211, *infra*), and purported to safeguard the dignity of the human person. This, *Article 22* of the Covenant of the League of Nations, on the mandates system, enunciated "the principle that the well-being and development" of the "peoples" at issue, under "tutelage", formed "a sacred trust of civilization"[71]. The mandates system, - it added, - was to ensure "freedom of conscience and religion", and to establish the prohibition of abuses of the past[72].

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[70]Just like the members of minorities, in the minorities system under the League of Nations. The procedures varied from one system to the other; on the right of international individual petition in those pioneering experiments, cf., e.g., C.A. Norgaard, The Position of the Individual in International Law, Copenhagen, Munksgaard, 1962, pp. 109-138; A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 Netherlands International Law Review (1977) pp. 373-392; A.A. Cançado Trindade, "Exhaustion of Local Remedies in the Experiment of the United Nations Trusteeship System", 61 Revue de Droit international de sciences diplomatiques et politiques - Genève (1983) pp. 49-66.

[71]It added - in a categorization that did not pass without criticism - that "the character of the mandate" (i.e., mandates A, B or C) "must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances".

[72]Such as, e.g., "the slave trade, the arms traffic and the liquor traffic".

95. On its part, *Article 73* of the United Nations Charter, concerning non-self-governing territories, determined that

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> *(a)* to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> *(b)* to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
>
> *(c)* to further international peace and security;
>
> *(d)* to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
>
> *(e)* to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply".

96. The lessons accumulated, by those who witnessed or survived the successive massacres and atrocities of the last hundred years, and those who study and think seriously about them today, cannot but lead to this humanist acknowledgement: in the roots of those juridical institutions (mandates, trusteeship, international administration of territories) we detect the belated consciousness of the *duty of care for the human kind*. This is, after all, in my own perception, their most invaluable common denominator.

VII. The Concern of the United Nations Organization as a Whole with the Humanitarian Tragedy in Kosovo

97. In the light of the previous considerations, we may now turn to the expressions of the United Nations Organization *as a whole* with the humanitarian tragedy in Kosovo which victimized its population for one decade (1989-1999). Not only the Security Council, but also the General Assembly, ECOSOC and the Secretary General expressed, on successive occasions, their grave concern with that humanitarian crisis. It had become, in fact, a matter of legitimate concern of the international community as a whole, in the framework of the United Nations Charter, as we shall see now.

1. The Security Council's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

98. By the turn of the century, in the period extending from March 1998 to September 2001, the Security Council expressed its concern with the grave humanitarian crisis in Kosovo. In its *Resolution 1160* (of 31.03.1998), the Security Council condemned both "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo" and "all acts of terrorism by the Kosovo Liberation Army"[73]. A few months later, in *Resolution 1199* (of 23.09.1998), the Security Council expressed its grave concern at the "rapid deterioration" of the "humanitarian situation in Kosovo"[74], with the "increasing violation of human rights and of international humanitarian law"[75]. In particular, *Resolution 1199* expressed its grave concern at

> "the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes"[76].

99. In the same *Resolution 1199*, the Security Council expressed its deep concern with the "flow of refugees" and the "increasing numbers of displaced persons", up to "50,000 of whom (...) without shelter and other basic necessities"[77]. It then warned against the "impending humanitarian catastrophe"[78] in Kosovo, and asserted

> "the right of all refugees and displaced persons to return to their homes in safety, and (...) the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so"[79].

The Security Council then demanded, still in *Resolution 1199*, the unimpeded and safe return of refugees and displaced persons to their homes, and "humanitarian assistance to them"[80], so as "to improve the humanitarian situation and to avert the impending humanitarian catastrophe"[81]; it also acknowledged the need "to bring to justice those members of the security forces who have been involved in the mistreatment of civilians"[82], through full cooperation with the Prosecutor of the International Tribunal for the Former Yugoslavia "in the investigation of possible violations" within its jurisdiction[83]. Resolution 1199 further asserted the support for a

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[73]Preamble, para. 3.

[74]Preamble, paras. 10 and 14.

[75]Preamble, para. 11.

[76]Preamble, para. 6.

[77]Preamble, para. 7.

[78]Preamble, para. 10, and operative part, para. 1.

[79]Preamble, para. 8.

[80]Operative part, paras. 5(c) and (e), and 12.

[81]Operative part, para. 2.

[82]Operative part, para. 14.

[83]Operative part, para. 13.

peaceful resolution of the Kosovo crisis, including "an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration"[84].

100. One month later, the Security Council adopted *Resolution 1203* (of 24.10.1998), whereby it reiterated this last objective in the same terms[85], as well as its deep "alarm" and concern with the continuation of the "grave humanitarian situation throughout Kosovo" and the pressing need to prevent "the impending humanitarian catastrophe"[86], which constituted "a continuing threat to peace and security in the region"[87]. *Resolution 1203* further reiterated its demand to the authorities of the Federal Republic of Yugoslavia to secure the safe return to their homes of all refugees and displaced persons, in the exercise of their own right of freedom of movement[88], - so as "to avert the impending humanitarian catastrophe"[89]. *Resolution 1203* called at last for "prompt and complete investigation" of "all atrocities committed against civilians", in "full cooperation with the International Tribunal for the Former Yugoslavia"[90].

101. Seven months later, the Security Council adopted *Resolution 1239* (of 14.05.1999), reiterating its "grave concern" at the humanitarian catastrophe in and around Kosovo", given the "enormous influx of Kosovo refugees" and the "increasing numbers of displaced persons within Kosovo"[91], calling for the effective coordination of "international humanitarian relief"[92]. After reaffirming "the right of all refugees and displaced persons to return to their homes in safety and in dignity"[93], *Resolution 1239* warned with emphasis that "the humanitarian situation will continue to deteriorate" in the absence of a proper "political solution" to the crisis[94].

102. The next step taken by the Security Council, shortly afterwards, was the adoption of its significant *Resolution 1244* (of 10.06.1999), commented *supra/infra*. Subsequently, the Security Council adopted *Resolution 1367* (2001), wherein it took note, in relation to Kosovo, of the situation concerning security in the borders, and stressed the "continuing authority" of the U.N. Secretary-General's Special Representative "to restrict and strictly control the flow of arms into, within and out of Kosovo, pursuant to resolution 1244(1999)"[95].

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[84]Preamble, para. 12.

[85]Preamble, para. 8.

[86]Preamble, para. 11.

[87]Preamble, para. 15.

[88]Operative part, paras. 12 and 9, and cf. para. 13.

[89]Operative part, para. 11.

[90]Operative part, para. 14.

[91]Preamble, paras. 3-4.

[92]Preamble, para. 5, and operative part, paras. 1-2.

[93]Operative part, para. 4.

[94]Operative part, para. 5.

[95]Preamble, para. 4.

2. The General Assembly's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

103. Earlier than the Security Council, as from 1994, the General Assembly began to express its concern with the grave humanitarian crisis in Kosovo. In its *Resolution 49/204* (of 23.12.1994), — the first of a series on the "Situation of Human Rights in Kosovo", - the General Assembly acknowledged the "continuing deterioration" of the human rights situation in Kosovo, with "various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo", including:

> "*(a)* police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice;
>
> *(b)* discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against Albanian pupils and teachers, the closing of Albanian-language secondary schools and university, as well as the closing of all Albanian cultural and scientific institutions;
>
> *(c)* the harassment and persecution political parties and associations of ethnic Albanians and their leaders and activities, maltreating and imprisoning them;
>
> *(d)* the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language;
>
> *(e)* the dismissal from clinics and hospitals of doctors and members of other categories of the medial profession of Albanian origin;
>
> *(f)* the elimination in practice of the Albanian language, particularly in public administration and services;
>
> *(g)* the serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration"[96].

104. The General Assembly then strongly condemned, in the same *Resolution 49/204*, these "measures and practices of discrimination" and "large-scale repression" of the "defenceless ethnic Albanian population", and the discrimination against ethnic Albanians "in the administrative and judiciary branches of government, education, health care and employment, aimed at forcing ethnic Albanians to leave[97]. It then demanded from the authorities of the Former Republic of Yugoslavia (Serbia and Montenegro) to bring to an "immediate end" all those human rights violations (including torture and other cruel, inhuman or degrading treatment; arbitrary searches and detention; denial of a fair trial; among others)[98]. It further encouraged the U.N. Secretary-General to pursue his "humanitarian efforts" in the region, *in liaison* with, *inter alia*, the

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[96] Preamble, para. 4.

[97] Operative part, paras. 1-2.

[98] Operative part, para. 3.

UNHCR and UNICEF, "with a view to taking urgent practical steps to tackle the critical needs of the people in Kosovo, especially of the most vulnerable groups affected by the conflict, and to assist in the voluntary return of displaced persons to their homes"[99].

105. One year later, the General Assembly adopted *Resolution 50/190* (of 22.12.1995), acknowledging the same acts of discrimination and violence[100], and reiterated – in a longer text - its concerns with the human rights violations in Kosovo[101]. It "urgently" demanded that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro):

> "*(a)* take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo, including, in particular, the discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989;
>
> *(b)* release all political prisoners and cease the persecution of political leaders and members of local human rights organizations;
>
> *(c)* allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and respect the will of its inhabitants as the best means of preventing the escalation of the conflict there;
>
> *(d)* abrogate the official settlement policy as far as it is conducive to the heightening of ethnic tensions in Kosovo;
>
> *(e)* reopen the cultural and scientific institutions of the ethnic Albanians;
>
> *(f)* pursue dialogue with the representatives of ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia"[102].

And, once again, the General Assembly encouraged the U.N. Secretary-General to pursue his "humanitarian efforts" in the region, together with, *inter alia*, the UNHCR and UNICEF, "to tackle the critical needs of the people in Kosovo, especially of the most vulnerable groups affected by the conflict", as well as "to assist in the voluntary return of displaced persons to their homes"[103].

106. The "continuing grave human rights situation in Kosovo" was again object of concern by the General Assembly, in its *Resolution 51/111* (of 12.12.1996)[104], whereby the Assembly condemned "all violations of human rights in Kosovo, in particular repression of the ethnic Albanian population and

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[99]Operative part, para. 5.

[100]Preamble, para. 5.

[101]Preamble, paras. 6 and 8, and operative part, paras. 1-2.

[102]Operative part, para. 3.

[103]Operative part, para. 5.

[104]Preamble, para. 2.

discrimination against them, as well as all acts of violence in Kosovo"[105]. It reiterated the aforementioned demands to the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)[106], and it again (para. 6-7) encouraged the U.N. Secretary-General to pursue his humanitarian endeavours with the appropriate humanitarian entities (such as UNHCR and UNICEF)

> "to tackle the critical needs of the people of Kosovo, especially of the most vulnerable groups affected by the conflict, and to assist in the voluntary return of displaced persons to their homes in conditions of safety and dignity"[107].

Moreover, *Resolution 51/111* called for compliance with the "principles of non-discrimination, equal protection before the law and the reduction and avoidance of statelessness"[108].

107. One year afterwards, the General Assembly, in Resolution *52/139* (of 12.12.1997), noted with concern "the use of force by Serbian police against peaceful Albanian student protesters of Kosovo on 1 October 1997"[109], and further expressed "deep concern" about "all violations of human rights and fundamental freedoms in Kosovo, in particular the repression of the ethnic Albanian population and discrimination against it, as well as acts of violence in Kosovo"[110]. Accordingly, the General Assembly called upon the authorities of the Federal Republic of Yugoslavia:

> "*(a)* to take all necessary measures to bring an immediate end to all human rights violations against ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989;
>
> *(b)* to release all political prisoners and to cease the persecution of political leaders and members of local human rights organizations;
>
> *(c)* to allow the return in safety and dignity of Albanian refugees from Kosovo to their homes;
>
> *(d)* to allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and to respect the will of its inhabitants as the best means of preventing the escalation of the conflict there;
>
> *(e)* to allow the reopening of the educational, cultural and scientific institutions of the ethnic Albanians"[111].

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[105] Operative part, para. 1.

[106] Operative part, para. 2.

[107] Operative part, para. 6.

[108] Operative part, para. 7.

[109] Preamble, para. 4.

[110] Operative part, para. 1.

[111] Operative part, para. 2.

Resolution 52/139 at last reiterated the same encouragement words to the U.N. Secretary-General[112] as previously done in earlier resolutions of the General Assembly on the situation of human rights in Kosovo (cf. *supra*).

108. In the following year, the General Assembly adopted an extensive resolution on the situation of human rights in Kosovo: by means of *Resolution 53/164* (of 09.12.1998), the General Assembly focused on "the regional dimensions of the crisis in Kosovo", and its "persistent and grave violations and abuse of human rights and humanitarian law in Kosovo"[113]. The General Assembly expressed its "grave" concern with

> "the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens (...) by the police and military"[114].

The General Assembly expressed further its concern with "reports of violence committed by armed ethnic Albanian groups against non-combatants and the illegal detention of individuals, primarily ethnic Serbs, by those groups"[115].

109. In its call for respect for human rights and international humanitarian law[116], *Resolution 53/164* condemned "the acts of violence, including kidnappings, by armed ethnic Albanian groups, in particular against non-combatants"[117]. Furthermore, it "strongly" condemned

> "the overwhelming number of human rights violations committed by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), the police and military authorities in Kosovo, including summary executions, indiscriminate and widespread attacks on civilians, indiscriminate and widespread destruction of property, mass forced displacement of civilians, the taking of civilian hostages, torture and other cruel, inhuman or degrading treatment (...)"[118].

110. Next, the General Assembly, by means of *Resolution 53/241* (of 28.07.1999), turned its attention to the financing of the United Nations Interim Administration Mission in Kosovo (UNMIK). The following resolution of the General Assembly on the matter, — *Resolution 54/183* (of 17.12.1999), — again shifted attention to the situation of human rights in Kosovo. It began by recalling "the background of years of repression, intolerance and violence in Kosovo", and the persisting challenge to build therein "a multi-ethnic society on the basis of substantial autonomy", as well as the "continuing problems", the "human rights and humanitarian situation", and the "regional dimensions of the crisis in Kosovo"[119].

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[112] Operative part, para. 7.

[113] Preamble, paras. 3-4.

[114] Preamble, para. 5.

[115] Preamble, para. 6.

[116] Operative part, para. 6, and cf. also operative part, paras. 14(e), 17, and 18 (a) and (b).

[117] Operative part, para. 9.

[118] Operative part, para. 8.

[119] Preamble, paras. 3-4.

111. It then expressed its concern with, and condemned, the persistent and "grave violations of human rights" and of international humanitarian law in Kosovo, affecting ethnic Albanians[120]. There had been many reported cases, - *Resolution 54/183* added, - of

> "torture, indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanians in Kosovo by the Yugoslav police and military, [as well as] frequent instances of harassment, periodic kidnapping and murder of ethnic Serb, Roma and other minorities of Kosovo by ethnic Albanian extremists"[121].

112. As a consequence, - *Resolution 54/183* went on, - "the entire population of Kosovo has been affected by the conflict"[122]. It then warned that all national minorities must benefit from "their full and equal rights"[123], and further stressed "the urgent need to implement effective measures to stop trafficking in women and children"[124]. In its operative part, *Resolution 54/183* called for a solution to the Kosovo crisis on the basis of "general principles"[125], putting an end to actions leading *de facto* or de *jure* to "ethnic cantonization"[126]. Moreover, it called upon all actors "to refrain from all acts of violence"[127], and

> "to facilitate the free and unhindered return to their homes, in safety and with dignity, of all displaced persons and refugees, of whichever ethnic background"[128].

113. In addition, *Resolution 54/183* requested humanitarian entities, and the UNHCR and the Office of the U.N. High-Commissioner for Human Rights to continue to take practical steps

> "to meet the critical needs of the people in Kosovo and to assist in the voluntary return of displaced persons to their homes in conditions of safety and dignity"[129].

It further urged all parties involved in the Kosovo crisis to support the efforts of UNICEF

> "to ensure that all children in Kosovo return to school as soon as possible and to contribute to the rebuilding and repair of schools destroyed or damaged during the conflict in Kosovo"[130].

114. The General Assembly continued to occupy itself of the humanitarian crisis of Kosovo. In the years preceding its request (by means of *Resolution 63/3*, of 08.10.2008) for an Advisory Opinion of this Court,

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[120]Preamble, paras. 5-6.

[121]Preamble, paras. 7-8.

[122]Preamble, para. 9.

[123]Preamble, para. 9.

[124]Preamble, para. 12.

[125]Operative part, paras. 1-2.

[126]Operative par, para. 7.

[127]Operative par, para. 6.

[128]Operative part, para. 11.

[129]Operative part, para. 14.

[130]Operative part, para. 21.

it adopted a series of fourteen resolutions on the financing of UNMIK[131]. And months after its request for an Advisory Opinion of the ICJ, the General Assembly adopted a new Resolution[132], again on the financing of UNMIK. The U.N. General Assembly has, thus, just like the Security Council, been constantly attentive to the evolving situation of Kosovo in recent years.

3. The Economic and Social Council's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

115. Not only the Security Council and the General Assembly, but also the Economic and Social Council (ECOSOC), likewise occupied itself with the situation of human rights in Kosovo, in its more troubling moments. By means of its *Resolution 1998/272* (of 30.07.1998), ECOSOC approved the requests of the old U.N. Commission on Human Rights that the special *rapporteur* on the situation of human rights in Former Yugoslavia carry out missions in the Federal Republic of Yugoslavia, including in Kosovo[133]. One year later, in its *Resolution 1999/232* (of 27.07.1999) ECOSOC again approved a request of the former U.N. Commission on Human Rights that the aforementioned special *rapporteur* conduct missions *inter alia* in Kosovo[134]; furthermore, ECOSOC endorsed the decision of the Commission on Human Rights to request the special *rapporteur* "to make interim reports as appropriate about his work in support of the Kosovo initiative of the United Nations High Commissioner for Human Rights"[135].

116. The former U.N. Commission on Human Rights, which used to report to ECOSOC and the Secretary-General, issued two resolutions in 1994 expressing its grave concern with the humanitarian tragedy in Kosovo. In its *Resolution 1994/72* (of 09.03.1994), the Commission, "gravely" concerned at the deteriorating human rights situation in Kosovo[136], strongly condemned in particular

> "the measures and practices of discrimination against and the violation of the human rights of the ethnic Albanians of Kosovo, as well as the large scale repression committed by the Serbian authorities"[137].

The Commission demanded that these authorities "respect the human rights" of ethnic Albanians in Kosovo, and further declared that "the best means to prevent the possible escalation of the conflict" was "to safeguard human rights, restore the autonomy of Kosovo and to establish democratic institutions in Kosovo"[138].

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[131]Namely, Resolution 54/245A of 23.12.1999; Resolution 54/245B of 15.06.2000; Resolution 55/227A of 23.12.2000; Resolution, 55/227B of 14.06.2001; Resolution 56/295 of 27.06.2002; Resolution 57/326 of 18.06.2003; Resolution 58/305 of 18.06.2004; Resolution 59/286A of 13.04.2005; Resolution 59/286B of 22.06.2005; Resolution 60/275 of 30.06.2006; Resolution 61/285 of 29.05.2007; and Resolution 62/262 of 20.06.2008; Resolution 63/295 of 30.06.2009; and Resolution 64/827 (general distribution of 18.06.2010, and cf. doc. A/C.5/64/L.47, of 28.05.2010).

[132]Resolution 63/295, of 30.06.2009.

[133]Item *(c)* (iii), para. 21.

[134]Item *(b)* (iii).

[135]Item *(c)* (i).

[136]Operative part, para. 25.

[137]Operative part, para. 26.

[138]Operative part, para. 27.

117. Shortly afterwards, the Commission, recalling an ECOSOC document[139], *Resolution 1994/76* (also of 09.03.1994) again condemned strongly the "discriminatory measures and practices as well as the violations of human rights, committed by Serbian authorities against ethnic Albanians in Kosovo[140], and urgently demanded that those authorities

> "*(a)* Cease all human rights violations, discriminatory measures and practices against ethnic Albanians in Kosovo, in particular arbitrary detention and violation of the right to a fair trial and the practice of torture and other cruel, inhuman and degrading treatment;
>
> *(b)* Release all political prisoners and cease all persecution of political leaders and members of local human rights organizations;
>
> *(c)* Establish democratic institutions in Kosovo and respect the will of its inhabitants as the best means of preventing the escalation of the conflict there (...)"[141].

118. The Commission, again recalling an ECOSOC document[142], in its *Resolution 1995/89* (of 08.03.1995) saw it fit to reiterate its deep concern with the ongoing human rights situation in Kosovo, and to repeat its "strong condemnation of "discriminatory measures and practices"[143] and its urgent demands (*supra*) to the Serbian authorities to put an end to them and to human rights violations, and to "respect the will of the inhabitants of Kosovo"[144]. Next, in its Resolution *1996/71* (of 23.04.1996), the Commission once again strongly urged the Serbian authorities "to revoke all discriminatory legislation and to apply all other legislation without discrimination, release all political detainees", and "allow the free return of ethnic Albanian refugees to Kosovo"[145]. Furthermore, it urgently demanded Serbian authorities to

> "take immediate action to put an end to the repression of and prevent violence against non-Serb populations in Kosovo, including acts of harassment, beatings, torture, warrantless searches, arbitrary detention, unfair trials, arbitrary unjustified evictions and dismissals (...)"[146].

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[139]Doc. E/CN.4/1994/110, referring to the report of the Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia (describing the "continuing deterioration" of that situation in Kosovo).

[140]Operative part, para. 1.

[141]Operative part, para. 2.

[142]U.N. doc. E/CN.4/1995/57, referring to the report of the special rapporteur on the situation of human rights in the former Yugoslavia (describing the brutalities and discriminatory measures perpetrated in Kosovo).

[143]Such as mass dismissals of civil servants, discrimination against ethnic Albanians in primary and secondary schools and University, dismissal of doctors and other members of the medical profession from clinics and hospitals, - generating forced migration.

[144]Operative part, paras. 29-31.

[145]Operative part, para. 25.

[146]Operative part, para. 26.

4. The Secretary General's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

119. Like other main organs of the United Nations (General Assembly, Security Council, ECOSOC - *supra*), the Secretary General of the United Nations also expressed on distinct occasions his grave concern with the humanitarian tragedy in Kosovo. Thus, in his *Report* of 12.07.1999 on UNMIK[147], he warned that

> "The humanitarian consequences of the conflict on the people of Kosovo have been profound. Out of a population estimated in 1998 to number 1.7 million, almost half (800,000) have sought refuge in neighbouring Albania, the former Yugoslav Republic of Macedonia and Montenegro during the past year. While estimates vary, up to 500,000 persons may have been internally displaced. Many internally displaced persons (IDPs) are in worse health than the refugees, having spent weeks in hiding without food or shelter. Many refugees and IDPs bear the scars of psychological trauma as well as physical abuse.
>
> As of 8 July 1999, more than 650,000 refugees had returned to Kosovo through a combination of spontaneous and Office of the United Nations High Commissioner for Refugees (UNHCR)-assisted movement. This leaves an estimated 150,000 persons in neighbouring regions and countries, 90,000 evacuees in third countries and an unknown number of asylum-seekers. Those who have not returned home will continue to require a high level of assistance in their country of asylum and upon eventual return. Within Kosovo, a still unknown number of individuals remain outside their homes. (...)" (paras. 8-9).

120. In the same *Report*, the U.N. Secretary General deemed it fit to add, *inter alia*, that

> "The adoption of Security Council resolution 1244 (1999) and the deployment of KFOR and UNMIK has marked the end of a tragic chapter in the history of the people of Kosovo. The task before the international community is to help the people of Kosovo to rebuild their lives and heal the wounds of conflict. Reconciliation will be a long and slow process. Patience and persistence will be needed to carry it through" (para. 117).

121. In his following *Report* of 16.09.1999[148] on UNMIK, the Secretary General pointed out that "[t]he level and nature of violence in Kosovo, especially against vulnerable minorities, remains a major concern. Measures taken to address this problem are having a positive effect, but continued vigilance is necessary" (para. 4). The *Report* addressed some of the most pressing measures to be taken:

> "Housing surveys have been conducted in more than 90 per cent of the war-affected villages. An estimated 50 thousand houses are beyond repair and another 50 thousand have sustained damage of up to 50 per cent, but are repairable. One of the most urgent tasks to be completed before winter is the temporary rehabilitation of the 50 thousand repairable houses" (para. 11).

122. To that end, UNMIK counted on the assistance of the UNHCR's emergency rehabilitation program (para. 11). Another prioprity are, - the Secretary General's *Report* added, - was "targeted assistance for women and children"; to that end, UNMIK counted on the assistance of UNHCR, UNICEF, and

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[147]UN doc. S/1999/779, of 12.07.1999, pp. 1-25.

[148]UN doc. S/1999/987, of 16.09.1999, pp. 1-12.

international local non-governmental organizations, which were "implementing a series of projects under a 'Kosovo Women's Initiative'" (para. 13). Parallel to those two *Reports*, early in the same year of 1999, the Secretary General also saw it fit to issue a statement, on 16.01.1999 (the day following the massacre of Raçak), expressing his grave concern as follows:

> "I am shocked to learn today of the alleged massacre of some 40 individuals, apparently civilians, in Kosovo. (...) I am gravely concerned at this latest development and call for a full investigation by the competent authorities. I appeal once again to all sides in Kosovo to refrain from any action that would further escalate the tragic situation"[149].

123. From 1999 onwards, the U.N. Secretary-General issued periodical and numerous *Reports* on the evolving work of UNMIK. Early in this decade (2002-2004), his *Reports* pursued the supervision of the agreed policy of "standards before status"[150]. In the following period (2006-2008), before the declaration of independence, the Secretary General drew the attention of all concerned to the importance of putting an end to violence for the future of Kosovo. Thus, in his *Report* of 05.06.2006[151], he pondered that

> "(...) Implementation of the standards is a measure of the commitment of the political leaders and Provisional Institutions of Kosovo to realizing a society where all people can live in dignity and without fear. (...) Real progress in this regard remains an essential factor in determining progress in the political process to determine Kosovo's future status. (...)
>
> Reconciliation remains essential for the future of a multi-ethnic Kosovo as well as stability in the region. Although all communities have a role in improving the conditions under which all can live and work together in harmony, the principal responsibility rests with the majority. (...)
>
> (...) Violence will affect the future status process, and must not be tolerated by any part of the society in Kosovo. (...)"[152].

124. In his following *Reports* on UNMIK, attention was increasingly turned to the setting up of provisional institutions for democratic and autonomous self-government, i.e., of public institution-building, so as to foster the consolidation of the rule of law in a democratic society[153]. In one of those *Reports* (that of 09.03.2007), the Secretary General stated:

> "After almost eight years of United Nations interim administration, Kosovo and its people need clarity on their future. (...) Moving towards a timely conclusion of the Kosovo future status political process and a sustainable solution to the future status of Kosovo should be a priority for the international community as a whole.

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[149]Cit. in M. Weller, The Crisis in Kosovo, 1989-1999, Cambridge, Docs. & Analysis Publ., 1999, p. 320. Two days later (18.01.1999) the U.N. High Commissioner for Refugees (Ms. S. Ogata) also expressed the grave concern of the UNHCR and condemned the atrocities; cf. cit. in *ibid.*, p. 321.

[150]Cf. SG, Report of 09.10.2002 (UN doc. S/2002/1126), para. 2; SG, Report of 29.01.2003 (UN doc. S/2003/113), paras. 12 and 61; SG, Report of 16.01.2004 (UN doc. S/2004/71), para. 2.

[151]UN doc. S/2006/361, of 05.06.2006, pp. 1-9.

[152]*Ibid.*, paras. 24 and 26-27, p. 8.

[153]Cf. Report of 01.09.2006 (UN doc. S/2006/707); Report of 20.11.2006 (UN doc. S/2006/906); Report of 09.03.2007 (UN doc. S/2007/134); Report of 29.06.2007 (UN doc. S/2007/395); Report of 28.09.2007 (UN doc. S/2007/582); Report of 03.01.2008 (UN doc. S/2007/768).

> Such a solution must entail a Kosovo that is stable and in which all communities can coexist in peace. The use of violence by extremist groups in Kosovo to achieve political objectives cannot be tolerated and should be strongly condemned"[154].

125. In the following *Report* (of 29.06.2007), the Secretary General took note of the report presented to him by his Special Envoy, containing "his recommendation of independence for Kosovo supervised initially by the international community, and his settlement proposal"[155]. In another *Report* (that of 20.11.2006), the Secretary General had already called upon "the leaders and people of Kosovo" to remain engaged in the political settlement, and added that "[i]t remains important for the Kosovo authorities to take the progress achieved still further, and not to lose sight of all the standards that are important to developing more stable and effective institutions and to improving the delivery of services to all people in Kosovo"[156].

126. There is, at last, a series of *Reports* of the Secretary General, covering developments pertaining to UNMIK since Kosovo's declaration of independence of 17 February 2008[157]. Shortly after the adoption of the declaration of independence by the Assembly of Kosovo on 17.02.2008, the U.N. Secretary General, in his *Report* of 28.03.2008, took note of the declaration (para. 3) and added that UNMIK continued "to operate on the understanding that resolution 1244 (1999) remains in force" (para. 29), but at the same time conceded that

> "Kosovo's declaration of independence has had a profound impact on the situation in Kosovo. The declaration of independence and subsequent events in Kosovo have posed significant challenges to the ability of UNMIK to exercise its administrative authority in Kosovo" (para. 30).

127. In his subsequent *Report* on UNMIK (of 12.06.2008), the Secretary General took note of the Constitution adopted by the Assembly of Kosovo 09.04.2008, to enter into force on 15.06.2008 (para. 7). This posed, in his view, "significant challenges" and "operational implications" for UNMIK to exercise its "administrative authority" (paras. 10, 14 and 17). In the following *Report* (of 15.07.2008), he added that "the authorities in Pristina have taken a number of steps to assert their authority in Kosovo" (para. 4), and UNMIK has been "confronted with a substantially changed situation in Kosovo" (para. 29).

128. The next *Report* (of 24.11.2008) of the Secretary General acknowledged the difficulty to reconcile Security Council resolution 1244 (1999) and the Kosovo Constitution (para. 21). At last, in a following *Report* (of 10.06.2009), the Secretary General added that, although, to the Kosovo authorities, Security Council resolution 1244 (1999) no longer appeared relevant (para. 2), the United Nations would "continue to adopt a position of strict neutrality on the question of Kosovo's status" (para. 40).

129. Thus, it clearly ensues from these and the previous *Reports* that, to start with, the main concern of the U.N. Secretary General and UNMIK was with the safety and the conditions of living of the population. It then turned to public institution-building. International administration of territory does not appear as an end in itself, - not international administration of territory for territorial administration's sake, - but rather as a means

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[154]UN doc. S/2007/134, of 09.03.2007, paras. 24-25, p. 7.

[155]UN doc. S/2007/395, of 29.06.2007, para. 2, p. 1, and docs. referred to therein.

[156]UN doc. S/2006/906, of 20.11.2006, para. 24, p. 7.

[157]Cf. SG, Report of 28.03.2008 (UN doc. S/2008/211); SG, Report of 12.06.2008 (UN doc. S/2008/354); SG, Report of 15.07.2008 (UN doc. S/2008/458); SG, Report of 24.11.2008 (UN doc. S/2008/692); SG, Report of 17.03.2009 (UN doc. S/2009/149); SG, Report of 10.06.2009 (UN doc. S/2009/300); SG, Report of 30.09.2009 (UN doc. S/2009/497); and SG, Report of 05.01.2010 (UN doc. S/2010/5).

to an end, namely, to secure the well-being of the "people" or the "population", and the inhabitants' living under the rule of law in a democratic society. As for the more recent *Reports*, issued by the time of Kosovo's declaration of independence, and shortly afterwards, it is difficult to escape the impression that, by then, Kosovo was already being envisaged as a State *in statu nascendi*.

5. General Assessment

130. From the review above, it is clear that the United Nations Organization *as a whole* was and has been concerned with the humanitarian tragedy in Kosovo. Each of its main organs (General Assembly, Security Council, ECOSOC and General Secretariat) expressed on distinct occasions its grave concern with it, and each of them was and has been engaged in the solution of the crisis, within their respective spheres of competence. Such domains of competence are not competing, but rather complementary, so as to fulfill the purposes of the United Nations Charter, in the light of the principles proclaimed therein (Articles 1-2). The crisis concerned the international community as a whole, and the United Nations Organization *as a whole* thus rightly faced it.

131. The International Court of Justice, the principal judicial organ of the United Nations (Article 92 of the U.N. Charter), has now been called upon to pronounce on one specific aspect, namely, that of the conformity, or otherwise, with international law, of the declaration of independence of Kosovo. In the exercise of its advisory function, and bearing in mind its high responsibility as the World Court, it has rightly refused to indulge into a false and fabricated problem of delimitation of competences between the main organs of the United Nations. It has kept in mind the principles and purposes of the U.N. Charter, together with general international law. It has acted as it should.

VIII. *EX INJURIA JUS NON ORITUR*

132. According to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or else rights for the wrongdoer[158]: *ex injuria jus non oritur*. In the period extending from the revocation of Kosovo's autonomy in 1989 until the adoption of the U.N. Security Council's resolution 1244(1999), successive grave breaches of international law were committed by all concerned. These grave breaches, from all sides, seriously victimized a large segment of the population of Kosovo. They comprised grave violations of human rights and of international humanitarian law from virtually all those who intervened in Kosovo's crisis.

133. In the course of the advisory proceedings before the Court, a couple of participants invoked the principle *ex injuria jus non oritur*, each one referring to one of the successive wrongful acts, in the course of the decade 1989-1999, and up to Kosovo's declaration of independence of 17 February 2008. None of them referred to the successive *injuriae* as a whole, - including three unwarranted NATO bombings of Kosovo in 1999, outside the framework of the U.N. Charter, and also generating "casualties" among hundreds of innocent civilians. There occurred, in fact, *injuriae* committed everywhere in the region as a whole, coming from a variety of sources (State and non-State alike).

134. The principle *ex injuria jus non oritur* applies to all those grave breaches, to the atrocities perpetrated against the population, as well as to the unwarranted use of force in the bombings of Kosovo

[158] P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 Recueil des Cours de l'Académie de Droit International de La Haye (1949) pp. 226-227, 230-231 and 256; H. Lauterpacht, Recognition in International Law, Cambridge, University Press, 1947, pp. 420-421.

(likewise causing numerous innocent victims in the civilian population), outside the framework of the U.N. Charter. U.N. Security Council resolution 1244(1999) cannot thus be read as endorsing wrongful acts of any origin or kind, nor as taking advantage of them. Quite on the contrary: Security Council resolution 1244(1999) reinserted the handling of Kosovo's humanitarian crisis within the framework of the U.N. Charter, in one of the great challenges to *the U.N. as a whole* (*not only its Security Council*) in our days. It can hardly be doubted that the Security Council, proceeding on the basis of chapter VII of the United Nations Charter, by means of its resolution 1244(1999), acted in a decisive way for the restoration and preservation of peace in Kosovo and the whole region.

135. In establishing UNMIK by that resolution, the Security Council has been careful not to anticipate or prejudge the outcome of the interim administration of Kosovo. Its balanced position is transparent in the terms of its resolution 1244(1999) as a whole: nowhere it professed an obsession – proper of traditional international law of the past – with territory to the detriment of the people, of the local population. It likewise took people into account. It had the principle *ex injuria jus non oritur* in mind.

136. This general principle, well-established as it is, has at times been counterbalanced by the maxim *ex factis jus oritur*[159]. This does not mean that Law can emerge out of grave violations of international humanitarian law, but rather as a response or reaction to these latter. In the conceptual universe of international law, as of Law in general, one is in the domain of *Sollen*, not of *Sein*, or at least in that of the tension between *Sollen* and *Sein*. In is inconceivable that States' rights can arise, or be preserved, by means of a consistent pattern of grave violations of human rights and of international humanitarian law.

137. Thus, the maxim *ex factis jus oritur* does not amount to a *carte blanche*, as Law plays its role also in the emergence of rights out of the tension between *Sollen* and *Sein*. In the present stage of evolution of the law of nations (*le droit des gens*), it is unsustainable that a people should be forced to live under oppression, or that control of territory could be used as a means for conducting State-planned and perpetrated oppression. That would amount to a gross and flagrant reversal of the ends of the State, as a promoter of the common good.

IX. Conditions of Living of the Population in Kosovo (since 1989): The Submissions Adduced in the Present Advisory Proceedings before the Court

138. In respect of the present request by the General Assembly for an Advisory Opinion of the ICJ, it seems to me wholly warranted, and indeed necessary, to turn attention to the conditions of living – or rather, of surviving, - of the population in Kosovo, ever since this latter was deprived of its autonomy in 1989 and until the U.N. international administration of the territory was established in 1999 by means of the adoption of the aforementioned resolution 1244(1999) of the Security Council. This crucial aspect was in fact object of attention, and was submitted to the cognizance of the Court, in the course of the present advisory proceedings, in both their written and oral phases.

1. Submissions during the Written Phase of Proceedings

139. In the course of the written phase, some of the participants in the proceedings sought to provide - apart from a descriptive account of the facts - an evaluation of the events which took place in that decade (1989-1999), irrespective of their conclusions on the central question at issue. Thus, in its Written Statement,

[159] H. Lauterpacht, "Règles générales du droit de la paix", 62 Recueil des Cours de l'Académie de Droit International de La Haye (1937) pp. 287-288; P. Guggenheim, "La validité et la nullité...", op. cit. supra n. (105), p. 231.

Germany, for example, adduced that the Yugoslav Government had created "a climate of absolute lawlessness in the region" and that

> "the responsible authorities not only failed to protect the life and physical integrity of their citizens of Albanian ethnicity, but that these citizens had become objects of constant prosecution, subjected to the most complete arbitrariness. . . . It was clearly conveyed to all ethnic Albanians that their presence was undesirable in Kosovo and that they would do better to leave the region for good" (pp. 16-17).

Germany then concluded that "[the] facts (...) speak for themselves", fully confirming that "at the beginning of 1999 there indeed existed, as observed and documented by knowledgeable and impartial third-party institutions, a humanitarian emergency, caused by serious crimes deliberately and purposefully committed by the security and military forces of the FRY, and that the criminal strategy gained unprecedented momentum when the KVM Observer Mission was withdrawn" (p. 19).

140. Likewise, in its Written Comment, the United Kingdom stressed that those events of great violence (between 1989 and 1999) were "horrific, well-documented and proven abuses of human rights, abuses that have been described and condemned by the U.N. General Assembly, the Security Council, by various U.N. treaty organs (such as the Committee on the Elimination of Racial Discrimination [CERD], and the Committee against Torture [CAT]), the former U.N. Commission on Human Rights, U.N. special *rapporteurs* (from 1992 to 1997), and by the International Committee of the Red Cross" (para. 14). The United Kingdom also referred to these sources in its Written Statement (paras. 2.25-2.40).

141. The Netherlands, on its part, recalling, in its Written Statement, the findings by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) *Milutinovic et al.* case (2009 – cf. *infra*), pointed out that there had been "campaigns of terror and violence" which resulted in "the denial of fundamental human rights in Kosovo", amounting to a pattern of breaches which

> "was serious because it was systematic, the joint criminal enterprise, in particular, evidencing that the breach was carried out in an organized and deliberate way. The breach was also serious in that it was gross: the number of expelled Kosovo Albanians and the nature and extent of the violence directed against them constituted evidence of the flagrant nature of the breach, amounting to a direct and outright assault on the values protected" (para. 3.12).

142. Norway, in turn, in its Written Statement, informed the ICJ that, in its letter of recognition of Kosovo (by the Royal Decree of 28.03.2008), it referred to the comprehensive assessment of evidence carried out by the ICTFY in the *Milutinovic et al.* case (2009). And, in its Written Comment, Norway further recalled that the Rambouillet Accords (of 1999) provided that Kosovo's final status should be determined on the basis of the "will of the people".

143. In its Written Statement, in the same line of concern, Albania referred to the report published by the International Commission of Experts to indicate that "through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo"; the purpose of such a campaign would have been to "displace a number of [Kosovo Albanians] sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission" (para. 29).

144. Albania referred to systematic repression, daily human rights violations and discriminatory State policies (between 1990 and 1995 - para. 11); it further invoked the reports of the U.N. *Special Rapporteur* on Human Rights in the Former Yugoslavia, and of Human Rights Watch (1997-1998, - paras. 18 and 20). Moreover, it also invoked the former U.N. Commission on Human Rights' resolution 1998/79, calling upon the Serbian authorities to put an end to torture and ill-treatment of persons under detention (para. 18). Albania at last added that "the intention to reduce the Albanian population in Kosovo to about 600,000 by killing members of the group or forcefully expelling them", was "known to foreign officials, and reportedly have been publicly uttered by Serbian officials" (para. 29). This concern was retaken by a handful of participants in the course of the oral phase of the present proceedings (cf. *infra*).

145. But still in the written phase of the proceedings, in its Written Statement Austria referred to various documentary sources, including the 2009 findings of the ICTFY in the *Milutinovic et al.* case, confirming the massive violations of human rights of international humanitarian law in Kosovo, as from the revocation of its autonomy in 1989 onwards, until the perpetration of crimes against humanity in 1999 (paras. 5-9). In its Written Statement, Estonia likewise observed that the long-lasting refusal of internal self-determination suffered by the Kosovar people was accompanied by grave violations of human rights and ethnic cleansing, as disclosed in various documentary U.N. sources (paras. 6-9).

146. Poland, likewise, drew attention, in its Written Statement, to the systematic and large-scale violations of human rights and international humanitarian law in Kosovo along the nineties, marked by the spreading of ethnic cleansing, forced displacement of people, arbitrary detentions and extra-legal executions, forced disappearances of persons, and other outbreaks of violence directed against Kosovo's civilian population (as established by the ICTFY, Trial Chamber, in its 2009 Judgement in the *Milutinovic et al.* case), rendering the situation of Kosovo unique and *sui generis*. To Poland, all this humanitarian tragedy should be taken into account in considering Kosovo's declaration of independence of 17 February 2008 (paras. 4.5.1 and 5.2.2.1).

147. Further references to the grave and systematic violations of human rights in Kosovo were made by Switzerland, in its Written Statement, which also referred to General Assembly resolutions and the ICTFY findings in the *Milutinovic et al.* case (*supra* - paras. 81-85). The United States, likewise, recalling a variety of U.N. documentary sources (General Assembly and Security Council, the former U.N. Commission on Human Rights, the U.N. High Commissioner for Human Rights, the ICTFY), observed in its Written Statement that the whole factual background of the massive violence and repression along the nineties was relevant for considering Kosovo's declaration of independence of 17.02.2008 (II-III, paras. 8-19).

148. Slovenia also, in its Written Statement, mentioned the systematic repression of Kosovo Albanians, as one of the factors that led to its recognition of Kosovo on 05.03.2008 (para. 5). Luxembourg, in its Written Statement, also took into account the factual background of the acute humanitarian crisis in Kosovo in the nineties, especially the late nineties, which called for a response of the international community (para. 6 n. 1). And Finland, also recalling the findings of the ICTFY in the *Milutinovic et al.* case (*supra*), pondered in its Written Statement that the factual background of the situation in Kosovo during the period 1989-2007 was to be taken into account for the consideration of its declaration of independence of 17.02.2008. In Finland's view, that factual situation was inserted into the violent break-up of Yugoslavia, within which the deliberate policy of repression and persecution of Kosovo Albanians along the decade 1989-1999 (seeking to render them defenceless) took place, culminating, in the spring of 1999, in massive displacement of people in and from Kosovo (paras. 10-11).

2. Submissions during the Oral Phase of Proceedings

149. The factual background of the grave humanitarian crisis in Kosovo was also brought to the ICJ's attention in the oral phase of the present advisory proceedings. The matter was retaken by participants, – irrespective of their conclusions on Kosovo's declaration of independence of 17.02.2008, - in the public sittings of the ICJ of the first half of December 2009. Thus, in its oral arguments, (present-day) Serbia, much to its credit, regretted the tragedies and pain provoked by the conflicts of 1998-1999; it conceded that there was ethnic cleansing in the city of Pristina, and all this - the generalized violence of State and non-State actors - led to the establishment in 1999 of the international administration of territory, and to the purported criminal sanction of individuals responsible for the grave breaches of human rights and International Humanitarian Law[160].

150. On their part, Kosovo's authorities, after recalling persecutions in the twenties, the fifties and the sixties, added that the forcible removal, by intimidation, of Kosovo's autonomy in 1989 by S. Milosevic led to the "humanitarian catastrophe" of 1998-1999, when there were large scale discrimination, grave human rights violations, war crimes, crimes against humanity, ethnic cleansing, massive refugee flows, loss of life and great suffering, - all rendering impossible for the people of Kosovo to contemplate a future within Serbia[161]. Albania, likewise, referred to the illegal deprivation of Kosovo's autonomy which led to those systematic and widespread violations of human rights, also including, in addition to ethnic cleansing, summary executions, torture and rape, forced disappearance of persons, forceful displacement of persons, in the hands of Serbian forces and paramilitaries[162]. Albania stated that over 1,5 million Kosovar Albanians were forcibly expelled from their homes, and argued that the denial of internal self-determination of Kosovo points to its independence[163].

151. Denmark also singled out the tragic events of the nineties; it contended that those gross human rights violations, led to the adoption of resolution 1244 (1999) of the Security Council, so as to address the real and daily needs of the "people" of Kosovo[164]. Brazil identified, in the adoption of Security Council resolution 1244(1999), a "clear rejection", by the U.N."collective security system", of "the use of the veil of sovereignty by any State to perpetrate heinous crimes against its own population"[165]. In the view of Spain, the grave situation of violations of human rights, of International Humanitarian Law, and of the rights of minorities in Kosovo, was "settled" in 1999, with the adoption of Security Council resolution 1244 (1999)[166]. Russia, in its turn, stated that resolution 1244 (1999) of the Security Council was the result of the tragedy which fell upon Kosovo, of the conflict which victimized its "community", and of the acts of terrorism of the Kosovo Liberation Army (KLA)[167].

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[160]ICJ, doc. CR 2009/24, of 01.12.2009, pp. 33-34.

[161]ICJ, doc. CR 2009/25, of 02.12.2009, pp. 15-19.

[162]ICJ, doc. CR 2009/26, of 02.12.2009, pp. 8-9.

[163]*Ibid.*, pp. 9 and 31.

[164]ICJ, doc. CR 2009/29, of 07.12.2009, pp. 66 and 74-75.

[165]ICJ, doc. CR 2009/28, of 04.12.2009, p. 17.

[166]ICJ, doc. CR 2009/30, of 08.12.2009, p. 18.

[167]ICJ, doc. CR 2009/30, of 08.12.2009, p. 45.

152. The United States, on its part, argued that Kosovo, having suffered a tragedy, marked by oppression and massive and systematic abuses of human rights, became detached from Serbia[168]. In turn, Croatia stressed that the illegal removal of the autonomy of Kosovo was followed by the systematic repression and grave violations of the human rights of its population, which, in turn, were followed by the U.N. international administration of Kosovo and the development, thereunder, of its self-administration[169]; in Croatia's view, Kosovo has now elements of statehood, and all this development should be taken into account by the ICJ[170].

153. Jordan recalled the well-documented history in Kosovo of discrimination, police brutality, arbitrary imprisonment, torture, ethnic cleansing, war crimes and crimes against humanity, victimizing the "people" of Kosovo, as from the denial of its autonomy in 1989; it further recalled that Kosovo's declaration of independence of 17.02.2008 provided for its international supervision and human rights guarantees[171]; Jordan further contended that, in these circumstances, the "people" of Kosovo are entitled to independence, emerged within the context of the disintegration of the SFRY in 1991[172]. The Netherlands, likewise, warned that there was an atmosphere of terror in Kosovo, with the killings, sexual assaults and forcible displacements; those grave breaches by Serbia, - it added, - generated the lawful exercise by the "people" of Kosovo of external self-determination, and the recognition of such right by the ICJ would in its view contribute to peace and stability in the region[173].

154. In the view of Finland, the atrocities perpetrated in Kosovo render it necessary to create the conditions wherein Kosovo's "communities" can live in peace and justice; hence, with the impossibility of returning to the *statu quo ante*, the emergence of the State of Kosovo, with its declaration of independence of 17.02.2008[174]. The United Kingdom, on its part, after recalling the "human rights catastrophe" which followed the revocation of Kosovo's autonomy in 1989, argued that secession is not regulated by international law, territorial integrity applies only to international relations, Article 1 of the two U.N. Covenants on Human Rights is not limited to decolonization cases only, and the stability which prevails in the region today flows, in its view, from Kosovo's independence[175].

155. All the aforementioned participants, as just seen, saw it fit to lay particular emphasis on the conditions of living – actually, of surviving, - of the population of Kosovo in the period concerned, namely, as from the revocation by Serbia of Kosovo's autonomy (constitutionally ensured since 1974) in 1989, that led to the great suffering imposed upon the population throughout a whole decade, until 1999. I feel obliged to leave on the records this aspect of the substantial advisory proceedings before this Court (written and oral phases), as, for reasons which escape my comprehension, they are not even referred to in the present Advisory Opinion of the Court. Significantly, that suffering of the population of Kosovo has now found judicial recognition, to which I shall turn next.

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[168]ICJ, doc. CR 2009/30, of 08.12.2009, pp. 31 and 33.

[169]ICJ, doc. CR 2009/29, of 07.12.2009, p. 57.

[170]*Ibid.*, p. 61.

[171]ICJ, doc. CR 2009/31, of 09.12.2009, pp. 28-31.

[172]*Ibid.*, pp. 30-32, 36-37, 39 and 41.

[173]ICJ, doc. CR 2009/32, of 10.12.2009, pp. 8, 11, 13 and 16.

[174]ICJ, doc. CR 2009/30, of 08.12.2009, pp. 52-53, 61 and 64.

[175]ICJ, doc. CR 2009/32, of 10.12.2009, pp. 42, 50 and 54.

X. Judicial Recognition of the Atrocities in Kosovo

156. As already indicated, the recent decision of the ICTFY (Trial Chamber) in the *Milutinovic et al.* case (2009), was in fact referred to, in the course of the written and oral phases of the present proceedings before the ICJ, by several participants (cf. *supra*). A careful reading of the judgment of the ICTFY (Trial Chamber) of 26 February 2009 discloses facts, determined by it, which appear to me of relevance to the ICJ for the purposes of the requested Advisory Opinion. The Trial Chamber of the ICTFY was very attentive to the atrocities perpetrated in Kosovo along the nineties. In my view, the ICJ, in the same line of thinking, cannot make abstraction of them.

157. In its judgment of 26 February 2009 in the *Milutinovic et al.* case, the Trial Chamber of the ICTFY found that there had been in Kosovo, in the period concerned, a "joint criminal enterprise", with the intent to commit crimes or to cover them up (paras. 95-96). The targeted groups - the victims - were civilians (para. 145). By means of the suppression of Kosovo's autonomy and of that "joint criminal enterprise", Kosovo was placed firmly under the control of Serbian authorities, and the Kosovo Albanian population became object of repressive and discriminatory practices, which led to the emergence of the KLA (paras. 211-213 and 222). In 1990, Kosovo had already become a "police State", with detentions and restrictions on the freedom of information; in 1991 professors and officials of the University of Pristina were removed and replaced by non-Albanians (paras. 224-225). By then, a system of discrimination against Kosovo Albanian workers was already imposed, and maintained throughout the nineties (paras. 226-228).

158. State-sanctioned discrimination took place even in the workplace, in labour relations; it was reported in the United Nations in 1992 the "dismissal of thousands of Kosovo Albanian workers, and the effect of the `Law on Labour Relations under Special Circumstances'", as well as "the measures taken by the Serbian authorities in Kosovo" (paras. 229-230). As from 1989, "laws, policies and practices were instituted that discriminated against the Albanians, feeding into local resentment and feelings of persecution" (para. 237). Those fears increased in 1996, with the emergence of the KLA, and its actions thereafter (para. 237).

159. Furthermore, impunity prevailed, as the local judicial system was not effective "in investigating, prosecuting, and punishing those responsible for committing serious crimes against the civilian population" (para. 569). As a result of all this, and particularly of the "excessive and indiscriminate force used by the forces of the FRY and Serbia in 1998", massive forced displacement took place: the United Nations (its High Commissioner for Human Rights) estimated that 285,500 people had been internally displaced towards the end of 1998 (paras. 913 and 918-919). In its resolution 1199 (1998), of 23.09.1998, the Security Council expressed its "grave concern" about "the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army" (para. 916). The Trial Chamber of the ICTFY established the occurrence of an armed conflict on the territory of Kosovo in 1998-1999 (para. 1217).

160. Last but not least, the Trial Chamber of the ICTFFY saw it fit to refer also to the efforts undertaken to reach a peaceful settlement of the humanitarian crisis of Kosovo. It recalled, in this connection, that, at the Conference of Rambouillet (1999), Kosovo Albanians - unlike S. Milosevic for Serbia - signed the agreement only after the inclusion of chapter 8, foreseeing the taking into account, for the determination of the status of Kosovo, first and foremost, "the will of the people in Kosovo" (para. 401).

XI. Further Evidence of the Atrocities in Kosovo: The Centrality of the Sufferings of the People

161. The substantial evidence obtained by the ICTFY in its judgment of 26 February 2009 in the *Milutinovic et al.* case (2009), is by no means the only one. A detailed account of the systematic and gross violations of the rights of workers in Kosovo (as from 1990), in flagrant breach of the fundamental principle of equality and non-discrimination, and in further "violation of the principles of the rule of law", is provided in the detailed Written Comments (of 17.07.2009) of Slovenia, lodged with this Court. Other sources could be referred to[176].

162. The argument that, since the utmost violence of 1998-1999 one decade has passed and the "conflict is over", somehow "buried" into oblivion, and that there is peace today in Kosovo and the aforementioned repression belongs to the past, is in my view superficial, if not unsustainable. It leads precisely to approach the matter from a "technical" point of view, making abstraction of the human sufferings of the recent past. The effects of oppression are still present, and account for Kosovo's declaration of independence on 17 February 2008. One cannot erase the massive violations of human rights and of International Humanitarian Law of the recent past, by invoking the passing of time. In this respect, in its Written Comment submitted to this Court, France has aptly pondered that

> "[w]hatever the political changes seen in Serbia since the fall of the Milosevic régime, the trauma and scars of the past were (and still are) far from healed. The brutal repression - and international crimes accompanying it - to which the Kosovar population was subjected in 1998-1999 could but prevent it from contemplating a future within the Serbian State, so deep the psychological wounds go (and still do) and so well entrenched in minds was (and still is) the memory of the atrocities

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[176]For example, Amnesty International opened its Report on Kosovo of 24.07.2006 with the warning that "respect for the human rights of all, without discrimination, should lie at the heart of the talks process. This should be a central and unifying consideration in all decisions and agreements made about the future of Kosovo" (para. 1). Almost one year later, in its subsequent Report on Kosovo of May 2007, Amnesty International, dwelling upon the ongoing forced displacement of persons, further warned that "[i]n addition to ongoing ethnically motivated attacks, impunity for past inter-ethnic violence - including war crimes, and in particular impunity for 'disappearances' and abductions, and continued impunity for perpetrators of the ethnic violence of March 2004, - continues to provide a massive barrier to minority return" (par. 3.2). - On its part, the 1999 Report of the OSCE Kosovo Verification Mission, provided an account of its findings in the period ranging from October 1998 to June 1999. In its foreword, Justice Louise Arbour warned that "the violence in Kosovo was horrific, and again proved devastating for the many ordinary people who became its victims" (p. 1). The atrocities comprised arbitrary arrest and detention, denial of fair trial, torture, rape and other forms of sexual violence (sometimes applied as a weapon of war), killings, targeting of children, forced expulsion on a massive scale, destruction of property and looting, - all "highly organized and systematic". Acts of utmost violence perpetrated in, e.g., Rogovo, Rakovina, Kacanik, Raçak, Pristina. According to the OSCE Report, by June 1999 over 90 per cent of the Kosovo Albanian population (over 1.45 million people) had been displaced by the conflict. In its summary (p. 2), the same Report stressed that "[o]n the part of the Yugoslav and Serbian forces, their intent to apply mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998, and was shockingly demonstrated by incidents in January 1999 (including the Raçak mass killing and beyond)". - In its turn, the Report of Human Rights Watch Humanitarian Law Violations in Kosovo, covering the period February-September 1998, gave a detailed account of grave breaches of International Humanitarian Law which took place (forced disappearances, killings, destruction of villages, arbitrary arrests, looting of homes by the police, burning of crops, taking of hostages and extrajudicial executions), victimizing mainly civilians, including "indiscriminate attacks on women and children"176. Special police forces acted in a planned, quick and well-organized manner, and "autopsies were not performed on any of the victims"176. There was a sustained pattern of serious crimes (duly reported) committed by the Serbian special police, in distinct localities of Kosovo176. Summing up, the Report attributed the majority of those acts of brutality to the government forces of the Serbian special police (MUP) and the Yugoslav Army (VJ), under the command of Yugoslav President Slobodan Milosevic; it attributed violence also, on a "lesser scale", to the Kosovo Albanian insurgency, the Kosovo Liberation Army (KLA), and added: - "The primary responsibility for gross government abuses lies with Slobodan Milosevic, who rode to power in the late eighties by inciting Serbian nationalist chauvinism around the Kosovo issue"; Human Rights Watch, Humanitarian Law Violations in Kosovo, London/N.Y., HRW, 1998, pp. 3-22 and pp. 26-65.

committed. There are crimes which cannot fade from the individual and collective memory" (para. 18).

163. To attempt to make abstraction of the suffering of the people or population of Kosovo in the years of repression is an illusory exercise. The scars of the bloodshed will take a long time to heal, they will take generations to heal. The experience, in this connection, of the recent adjudication by international human rights tribunals such as the Inter-American and the European Courts of Human Rights, of *cases of massacres* lodged with them, contains invaluable lessons, worthy of attention and deserving of being rescued in this respect. One of such lessons lies in the enhanced *centrality* of the position of those victimized by human cruelty, and of their suffering.

164. To recall but one example of the recent cycle of *cases of massacres* brought before, and adjudicated by, international human rights tribunals (a noticeable advance of the old ideal of the realization of international justice), - in the case of the *Moiwana Community versus Suriname*, the massacre of the members of that Community (by State-organized, trained and armed perpetrators) had taken place in late 1986, but only two decades later, their case, lodged with the Inter-American Court of Human Rights, was adjudicated by this latter (Judgment on the merits, of 15.06.2005). In my Separate Opinion in the *Moiwana Community* case, I deemed it fit to ponder:

"The circumstances of the present case of the *Moiwana Community versus Suriname* invite one to a brief reflection, going beyond its confines. Well before, as well as after, the attainment of statehood by Suriname, the existence of the Maroon peoples (like the Saramakas in the *Aloeboetoe* case and the N'djukas in the present *Moiwana Community* case, before this Court) has been marked by suffering, in their constant struggle against distinct forms of domination.

The projection of human suffering in time (its temporal dimension) is properly acknowledged, e.g., in the final document of the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Dunbar, 2001), its adopted Declaration and Programme of Action. In this respect, it began by stating that

> 'We are conscious of the fact that the history of humanity is replete with major atrocities as a result of gross violations of human rights and believe that lessons can be learned through remembering history to avert future tragedies' (para. 57).

It then stressed the 'importance and necessity of teaching about the facts and truth of the history of humankind', with a view to 'achieving a comprehensive and objective cognizance of the tragedies of the past' (par. 98). In this line of thinking, the Durban final document acknowledged and profoundly regretted the 'massive human suffering' and the 'tragic plight' of millions of human beings caused by the atrocities of the past; it then called upon States concerned 'to honour the memory of the victims of past tragedies', and affirmed that, wherever and whenever these occurred, 'they must be condemned and their recurrence prevented' (par. 99).

The Durban Conference final document attributed particular importance to remembering the crimes and abuses of the past, in emphatic terms:

> 'We emphasize that remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the

truth about history, are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity' (para. 106). (...)

In the present case of the *Moiwana Community*, the *handicap* of, or harm suffered by, the survivors of the massacre and close relatives of the direct victims, of the massacre perpetrated on 29 November 1986 in the N'djuka Maroon village of Moiwana, is a spiritual one. Under their culture, they remain still tormented by the circumstances of the violent deaths of their beloved ones, and the fact that the deceased did not have a proper burial. This privation, generating spiritual suffering, has lasted for almost twenty years, from the moment of the perpetration of the 1986 massacre engaging the responsibility of the State until now. The N'djukas have not forgotten their dead. (...) Nor could they. (...)

For the first time in almost two decades, since the massacre at Moiwana village in 1986, the survivors found redress, with the present Judgment of the Inter-American Court. In the meantime, the N'djukas did not, and could not, forget their innocent and defenceless beloved relatives, murdered in cold blood. And they will never forget them, but their suffering - theirs together with their dead - has now been at least judicially recognized. Their long-standing longing for justice may now be fulfilled, so that they can rest in peace with their beloved deceased.

(...) The usual blindness of power-holders as to human values has not succeeded - and will never succeed - in avoiding human thinking to dwell upon the conception of human mortality, to reflect on the enigmas of existence and death. (...)

Human thinking on mortality has, in fact, accompanied humankind in all ages and cultures. In the old Paleolithic times, there was a cult to the memory, and in ancient Egypt the living and their dead remained close together[177]. In ancient Greece, a new sensitivity towards *post mortem* destiny arose[178]. It need only be recalled, as two examples among many, namely, Plato's contribution, in securing the continuity of human experience through the immortality and transmigration of the soul, as well as Budha's contribution of detaching human suffering from in his view what originates it, the desires[179]. The myth of the `eternal return' (or repetition), so widespread in ancient societies (as in Greece), conferring upon time a cyclic structure, purported to annul (or even abolish) the irreversibility of the passing of time, to contain or withhold its virulence, and to foster regeneration[180].

In modern times, however, human beings became ineluctably integrated into history and to the idea of 'progress', implying the 'definitive abandonment of the paradise of the archetypes and of the repetition'[181], proper of ancient cultures and religions. In the Western world, there came to prevail, in the XXth century, an attitude of clearly avoiding to refer to death; there came to prevail

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[177] J.L. de León Azcárate, La Muerte y Su Imaginario en la Historia de las Religiones, Bilbao, Universidad de Deusto, 2000, pp. 24-25, 37, 50-51 and 75.

[178] *Ibid.*, pp. 123 and 130.

[179] J.P. Carse, Muerte y Existencia - Una Historia Conceptual de la Mortalidad Humana, Mexico, Fondo de Cultura Económica, 1987, pp. 85 and 167.

[180] M. Eliade, El Mito del Eterno Retorno, Madrid/Buenos Aires, Alianza Ed./Emecé Ed., 2004, pp. 90-91.

[181] *Ibid.*, p. 156.

a 'great silence' about death[182]. Contemporary Western societies came to 'prohibit' the consideration of death at the same time that they fostered hedonism and material well-being[183].

While ancient cultures were very respectful of the elderly, 'modern' societies try rather to put them aside[184]. Ancient cultures ascribe great importance to the relationships between the living and the dead, and to death itself as part of life. Modern societies try in vain to minimize or ignore death, rather pathetically. Nowadays there is stimulus simply to forget (...)"[185].

165. In the present Advisory Opinion, the ICJ should not have eluded, as it did, the consideration of the facts - the atrocities undergone by the people in Kosovo in the decade 1989-1999 - which led to the adoption by the U.N. Security Council of its resolution 1244(1999). This factual background was taken note of in several preceding resolutions of the Security Council itself, as well as of the General Assembly and ECOSOC, and in reports of the U.N. Secretary General. One cannot avoid the sunlight with a blindfold. That factual background has been duly captured by human conscience, by the United Nations as a whole, - whether the ICJ evades it or not. It is of great importance to keep the *grave humanitarian tragedy* of Kosovo in mind, so as to avoid the repetition in the future of the crimes against humanity therein committed in the course of a decade.

166. At this stage of my Separate Opinion in the present Advisory Opinion of the ICJ, may I summarize the factual background and context of the present request for an Advisory Opinion of the ICJ. As pointed out by several participants in their Written Statements and Comments, as well as in the course of their oral arguments in the public hearings before this Court, the forcible removal, in 1989, by the Serbian authorities, of Kosovo's autonomy, led to the humanitarian catastrophe, which reached the point of highest tension in 1998-1999. During this catastrophe, grave and successive violations of human rights and of international humanitarian law occurred, including mass killings, war crimes, crimes against humanity, ethnic cleansing, massive refugee flows, massive forcible displacement of large segments of the population. Over 1,5 million Kosovar Albanians were forcibly expelled from their homes.

167. There were systematic and widespread violations of human rights, including torture and rape, forced disappearance of persons, abductions, indiscriminate attacks on women, targeting of children, taking of hostages, arbitrary arrests, summary and extrajudicial executions, in the hands of Serbian forces and paramilitaries. There also occurred destruction of property, looting of homes by the police, burning of crops, - all highly organized and systematic.

168. State-sanctioned discrimination took place in the workplace, in labour relations, in public health, and in education. The basic needs of the population were no longer met with, as a result of State-sanctioned discrimination. The judicial system failed to work, and total impunity prevailed. Systematic and gross violations of the rights of workers in Kosovo occurred (as from 1990) in flagrant violation of the fundamental principle of equality and non-discrimination, and in further breach of the rule of law. As violence breeds violence, as from the mid-nineties KLA violence was added to the context of social disruption in Kosovo. The

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[182] Ph. Ariès, Morir en Occidente desde la Edad Media hasta Nuestros Días, Buenos Aires, A. Hidalgo Ed., 2000 (reed.), pp. 196-199, and cf. pp. 213 and 238.

[183] *Ibid.*, p. 251.

[184] Cf. [Various authors,] Dialogue among Civilizations - The Round Table on the Eve of the United Nations Millennium Summit, Paris, UNESCO, 2001, p. 84 (intervention by E. Morin).

[185] IACtHR, case of the Moiwana Community versus Suriname, Judgment (merits) of 15.06.2005, Series C, n. 124, Separate Opinion of Judge A.A. Cançado Trindade, paras. 24-27, 29-30, 33 and 35-38.

State-planned widespread oppression created an atmosphere of terror, and led to the adoption of resolution 1244 (1999) of the Security Council, so as to address the pressing daily needs of the "people" or "population" of Kosovo.

XII. The People-Centered Outlook in Contemporary International Law

1. "People" or "Population" and Statehood Revisited

169. In the past, expert writing on statehood seemed obsessed with one of the constitutive elements of statehood, namely, territory. The obsessions of the past with territory became reflected, in the legal profession, in the proliferation of writings on the matter, in particular on the acquisition of territory. Those past obsessions led to the perpetration of the abuses of colonialism, and other forms of dominance or oppression. All this happened at a time when international law was approached from the strict and reductionist outlook of inter-State relations, overlooking - or appearing even oblivious of - the needs and legitimate aspirations of the subjugated peoples.

170. The preconditions for statehood in International Law remain those of an objective international law, irrespective of the "will" of individual States. As to the classic prerequisites of statehood, gradually greater emphasis has shifted from the element of territory to that of the normative system[186]. In more recent times, it has turned to that of the population, - pursuant to what I would term as the people-centered outlook in contemporary international law, - reflecting the current process of its *humanization*, as I have been sustaining for many years. In fact, the law of nations has never lost sight of this constitutive element - the most precious one - of statehood: the "population" or the "people", irrespective of the difficulties of international legal thinking[187] to arrive at a universally-accepted definition of what a "people" means.

171. Even some exercises of the past, - which have proven to be long-lasting and still valuable, - disclosed concern with the conditions of living of the "people" or the "population", in an endeavour which at their time was perhaps not grasped with sufficient clarity. Thus, the *célèbre* 1933 Montevideo Convention on the Rights and Duties of States was adopted at the VII International Conference of American States, as the most significant achievement of a Latin American initiative prompted by a regional resentment against interventionist and certain commercial) policies. The *Proceedings* (*Actas*) of the Montevideo Conference reveal that the *travaux préparatoires* of the aforementioned 1933 Convention were marked by reliance on principles of international law, so as to protect "small or weak nations"[188].

172. Those principles emanated from the "juridical conscience" of the continent[189]. In the course of that Conference's debates on the Draft Convention, there were in fact reiterated expressions of concern with the conditions of living of the *peoples* (*pueblos*) of the continent[190]. It comes, thus, as no surprise, that the 1933

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[186]Cf., e.g., K. Marek, Identity and Continuity of States in Public International Law, 2nd. ed., Geneva, Droz, 1968, pp. 1-619.

[187]The endeavours of conceptualization of "people", in connection with the exercise of self-determination in international law, have given rise to much discussion in recent decades, which have, however, remained inconclusive to date. Cf., on this particular point, e.g., J. Summers, Peoples and International Law, Leiden, Nijhoff, 2007, pp. XXXIII, 26, 73. 164, 174-175, 244-245, 269-270, 306, 314 and 404.

[188][Actas de la] VII Conferencia Internacional Americana (1933) - II Comisión: interventions of Haiti (pp. 12-13), Nicarágua (pp. 15 and 60-61), Ecuador (p. 34), Argentina (pp. 38 and 40-41), El Salvador (p. 52) and Cuba (p. 60) [original document deposited in the Columbus Memorial Library - OAS, Washington D.C.; copy of the document on file with me].

[189]*Ibid.*, interventions of Colombia (pp. 43-45 and 57-59), Brazil (p. 55), Nicaragua (pp. 62-63 and 72) and Uruguay (pp. 65-67).

[190]*Ibid.*, interventions of Mexico (pp. 20-21), Ecuador (p. 34), Chile (p. 48) and Nicaragua (pp. 62-63).

Montevideo Convention, adopted on 26.12.1933 (having entered into force on 26.12.1934), in dwelling upon the prerequisites of statehood, already at that time referred *first* to the population, and then to the other elements. In the wording of its Article I,

> "The State as a person of international law should possess the following qualifications: *(a)* a permanent population; *(b)* a defined territory; *(c)* government; and *(d)* capacity to enter into relations with the other States".

2. The Principle of Self-Determination of Peoples under Prolonged Adversity or Systematic Oppression

173. In our age of the advent of international organizations, the former experiments of the mandates system (in the League of Nations era), and of the trusteeship system (under the United Nations), to which the contemporary (and distinct) U.N. experiments of international administration of territory (such as Kosovo and East Timor) can be added, display one common denominator: the concern with the conditions of living, the well-being and the human development of the peoples at issue, so as to free them from the abuses of the past, and to empower them to become masters of their own destiny (cf. *supra*).

174. The historical process of emancipation of peoples in the recent past (mid-XXth century onwards) came to be identified as emanating from the principle of self-determination, more precisely external self-determination. It confronted and overcame the oppression of peoples as widely-known at that time. It became widespread in the historical process of decolonization. Later on, with the recurrence of oppression as manifested in other forms, and within independent States, the emancipation of peoples came to be inspired by the principle of self-determination, more precisely internal self-determination, so as to oppose tyranny.

175. Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, in order to face nowadays new and violent manifestations of systematic oppression of peoples. International administration of territory has thus emerged in U.N. practice (in distinct contexts under the U.N. Charter, as, e.g., in East Timor and in Kosovo). It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of "remedial", or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.

176. No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized. What has happened in Kosovo is that the victimized "people" or "population" has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination (cf. *infra*). The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*.

XIII. PRINCIPLES OF INTERNATIONAL LAW, THE LAW OF THE UNITED NATIONS AND THE HUMANE ENDS OF THE STATE

1. Territorial Integrity in the Framework of Those Humane Ends

177. Along the last four decades, growing attention has been turned to the treatment dispensed by States to the populations concerned. This has become a matter of concern in contemporary international law. The debate on *human* security has echoed in the U.N. General Assembly along the last decade, reminding States that theirs is the duty *to protect and to empower* their inhabitants. They cannot engage in criminal activities against their population. Human conscience has again awakened to respond to the pressing need to secure that abuses of the past and the present are no longer committed in the future, to the detriment of the population. Two illustrations may be recalled in this connection.

178. The celebrated resolution 2625(XXV) of 1970 of the U.N. General Assembly, containing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[191], states in paragraph 5(7) that:

> - "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*" [emphasis added].

179. The Court could, and should, have given close attention to this particular paragraph of the U.N. Declaration of Principles, when it recalled another passage of the 1970 Declaration in paragraph 80 of the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*. After all, this paragraph of the U.N. Declaration of Principles has a direct bearing on the question put to the Court by the General Assembly, and should at least have been considered together with the paragraph that the Court saw it fit to refer to. The relevance of compliance with the principle of equal rights and self-determination of peoples, in relation to the States' territorial integrity, as set forth in paragraph 5(7) of the 1970 Declaration, has not passed unnoticed along the years in expert writing on this particular subject[192].

180. Thus, in the line of the previous considerations, the government of a State which incurs into grave and systematic violations of human rights ceases to represent the people or population victimized. This understanding has been reiterated, in even stronger terms, at the outcome of the II World Conference on Human Rights held in Vienna, by the 1993 Vienna Declaration and Programme of Action (paragraph 2), which restates:

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[191] Hereinafter referred to as the "1970 U.N. Declaration of Principles".

[192] Cf., e.g., Milan Sahovic, "Codification des principes du Droit international des relations amicales et de la coopération entre les États", 137 Recueil des Cours de l'Académie de Droit International de La Haye (1972) pp. 295 and 298; O. Sukovic, "Principle of Equal Rights and Self-Determination of Peoples", in Principles of International Law concerning Friendly Relations and Cooperation (ed. M. Sahovic), Belgrade, Institute of International Politics and Economics/Oceana, 1972, pp. 338-341, 346-347 and 369-373; G. Arangio-Ruiz, The U.N. Declaration on Friendly Relations and the System of the Sources of International Law, Alphen aan den Rijn, Sijthoff/Noordhoff, 1979, pp. 135-136 and 140-141; P. Thornberry, "The Principle of Self-Determination", in The United Nations and the Principles of International Law - Essays in Memory of M. Akehurst (eds. V. Lowe and C. Warbrick), London/N.Y., Routledge, 1994, pp. 176 and 192-195.

- "(...) The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*" [emphasis added].

181. The final document of a memorable United Nations World Conference, - the II World Conference on Human Rights of 1993, - went further than the 1970 Declaration of Principles, in proscribing discrimination "*of any kind*". The massive violations of human rights and international humanitarian law to which the Kosovar Albanians were subjected in the nineties met the basic criterion set forth in the 1970 U.N. Declaration of Principles, and enlarged in scope in the 1993 final document of the U.N.'s II World Conference on Human Rights. The entitlement to self-determination of the victimized population emerged, as the claim to territorial integrity could no longer be relied upon by the willing victimizers.

2. The Overcoming of the Inter-State Paradigm in International Law

182. Principles of international law, as formulated in the U.N. Charter (Article 2) and restated in the 1970 U.N. Declaration of Principles, besides retaining their full validity in our days, have had significant projections in time, accompanying *pari passu*, and guiding, the evolution of international law itself. This applies to the seven restated principles[193] in the 1970 Declaration of Principles (to which the ICJ has been attentive in its case-law)[194], including *the principle of equality of rights and self-determination of peoples*, pointing towards the overcoming of the traditional inter-State dimension of International Law.

183. In the restatement of the principle of equality of rights and self-determination of peoples by the 1970 U.N. Declaration of Principles of International Law, it was explained that even a non-self-governing territory (under chapter XI of the U.N. Charter) has a separate and distinct status from the territory of the State which administers it, so that the people living therein can exert their right of self-determination in accordance with the principles and purposes of the U.N. Charter[195].

184. Recent developments in contemporary international law were to disclose the dimensions both *external* and *internal* of the right of self-determination of peoples: the former meant the right of every people

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[193]Namely: 1) the principle of the prohibition of the threat or use of force in international relations; 2) the principle of peaceful settlement of disputes; 3) the principle of non-intervention in the internal affairs of States; 4) the States' duty of international cooperation in accordance with the U.N. Charter; 5) the principle of equality of rights and self-determination of peoples; 6) the principle of sovereign equality of States; and 7) the principle of good faith in the fulfillment of obligations in accordance with the U.N. Charter.

[194]As, for example, and as well-known, in its Advisory Opinion on Western Sahara of 1975, and in its Judgments in the Nicaragua versus United States case of 1986, and in the East Timor case of 1995.

[195]The international legal status of that territory (under chapter XI of the U.N. Charter) generates likewise obligations of respect for the right of self-determination of the people living in it, as well as for the safeguard of the human rights of its inhabitants; cf., in this respect, e.g., I. Brownlie, "The Rights of Peoples in Modern International Law", in The Rights of Peoples (ed. J. Crawford), Oxford, Clarendon Press, 1988, pp. 1-16; [Various authors,] Les résolutions dans la formation du droit international du développement (Colloque de 1970), Genève, IUHEI, 1971, pp. 63-67.

to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary – in case of systematic oppression and subjugation - against their own government. This distinction[196] challenges the purely inter-State paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples[197] under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation.

185. The emergence and evolution of the International Law of Human Rights came to concentrate further attention in the treatment dispensed by the State to all human beings under its jurisdiction, in the *conditions of living* of the population, in sum, in the function of the State as promoter of the common good. If the legacy of the II World Conference on Human Rights (1993) convened by the United Nations is to be summed up, it surely lies in the recognition of *the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere and at any time*[198], with special attention to those in situation of greater vulnerability and standing thus in greater need of protection. Further than that, this is the common denominator of the recent U.N. cycle of World Conferences along the nineties, which sought to conform the U.N. agenda for the dawn of the XXIst century. Ironically, while the international community was engaged in this exercise, at the same time discriminatory practices and grave violations of human rights and international humanitarian law kept on being perpetrated in Kosovo, and the news of those practices and violations promptly echoed in the United Nations.

186. Both the Security Council and the General Assembly, as well as other organs of the United Nations, promptly responded to the aggravation of the *humanitarian crisis* in Kosovo, by means of a series of resolutions they adopted (cf. *supra*). Security Council resolution 1244(1999) itself, adopted on 10 June 1999, established UNMIK, drawing attention to the "grave humanitarian situation in Kosovo"[199], amounting to a "humanitarian tragedy"[200]. It condemned all acts of violence against, and repression of, the population in Kosovo[201]. It called for, and insisted on, the voluntary and safe return of all refugees and (internally) displaced persons to their homes[202].

187. Its major concern was with the *population* in Kosovo; it thus decided to facilitate a "political process designed to determine Kosovo's future status"[203]. To that end, and "pending a final settlement", it

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[196]Endorsed in expert writing; cf., e.g., A. Cassese, Self-Determination of Peoples - A Legal Reappraisal, Cambridge, University Press, 1995, pp. 1-365; P. Thornberry, "The Principle of Self-Determination", in The United Nations and the Principles of International Law..., op. cit. supra n. (192), pp. 175-203; Ch. Tomuschat, "Self-Determination in a Post-Colonial World", in Modern Law of Self-Determination (ed. Ch. Tomuschat), Dordrecht, Nijhoff, 1993, pp. 1-20; A. Rosas, "Internal Self-Determination", in *ibid.*, pp. 225-251; J. Salmon, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?", in *ibid.*, pp. 253-282.

[197]Cf., on the matter, e.g., United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. doc. HRI/GEN/1/Rev.3, of 15.08.1997, p. 13, paras. 1-2 and 6.

[198]A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, 2nd. ed.,vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 241-242; *ibid.*, 1st. ed., vol. II, 1999, pp. 263-276; *ibid.*, 1st. ed., vol. III, 2003, pp. 509-510.

[199]Preamble, para. 4.

[200]Preamble, para. 6.

[201]Preamble, para. 5; operative part, para. 3; Annex 1; and Annex 2, para. 1.

[202]Preamble, para. 7; operative part, para. 9*(c)*, 11*(k)* and 13; Annex 1; Annex 2(4) and (7).

[203]Operative part, para. 11*(e)*.

further decided to promote "substantial autonomy and self-government in Kosovo"[204]. Accordingly, two years after the adoption of Security Council resolution 1244(1999), the Head of UNMIK, Special Representative of the U.N. Secretary-General (Mr. H. Haekkerup), promulgated, on 15 May 2001, the newly-created "*Constitutional Framework for Provisional Self-Government in Kosovo*"[205]. The adoption of this document resulted from a concerted dialogue involving UNMIK itself, Kosovo's authorities and members of its distinct communities; significantly, the Constitutional Framework was not "conceptually linked" to any State, and rather addressed an "internationalized territory"[206].

188. It went beyond the strict inter-State paradigm in international law. The aforementioned Constitutional Framework favoured the emergence of a "multi-ethnic civil society", guided by the principles of protection to the national communities and of supervision by the Special Representative of the U.N. Secretary-General. In this understanding, it delegated to local institutions in Kosovo parts of the responsibility that UNMIK itself had undertaken since mid-1999, thus taking a relevant step towards the attainment of self-government in Kosovo[207]. In Kosovo's evolving domestic legal order in its new era, a key role was reserved to the fundamental principles of equality and non-discrimination, and of humanity (in the framework of the *Law of the United Nations*), to which I shall now turn.

3. The Fundamental Principle of Equality and Non-Discrimination

189. I have already referred to the fact that the "principle of identical treatment in law and in fact" found judicial recognition, by the PCIJ, before the 1948 Universal Declaration of Human Rights (cf. paras. 70-71, *supra*). And even before that, it was deeply-engraved in human conscience. More recently, the ICJ, in its *célèbre* Advisory Opinion on *Namibia* of 1971, pointed out that "the injured entity" was a "people", which had to "look to the international community for assistance (para. 127). In their Separate Opinions, Judge Ammoun stressed the relevance of "the principles of equality, liberty and peace" embodied in the U.N. Charter and the 1948 Universal Declaration (pp. 72 and 76-77), and Judge Padilla Nervo stressed the U.N. Charter's call (Articles 1(3) and 76(c)) for the promotion of respect for human rights "for all, without distinction as to race (...)" (pp. 111 and 126).

190. The fundamental principle of equality and non-discrimination is indeed of the utmost importance in the framework of the *Law of the United Nations*. When the United Nations engaged itself in the protection of the inhabitants of trust territories (chapter XII of the U.N. Charter), or else of non-self-governing territories (chapter XI), its humanitarian initiatives intended to bring about changes in the international legal order itself, as part of the historical process of its *humanization*. In its outlook, sovereignty "resided with the people, was at their service; such "people-centred vision of sovereignty" was remindful of the preamble of the United Nations Charter, evoking "We, the peoples of the United Nations"; this outlook is further illustrated by some rather

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[204] Operative part, para. 11*(a)*.

[205] U.N. doc. UNMIK Regulation 2001/9.

[206] Carsten Stahn, "Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government", 14 Leiden Journal of International Law (2001) pp. 542 and 544.

[207] *Ibid.*, pp. 531-532, 557-558 and 561.

novel conceptions, such as States' automatic succession into human rights treaties, or extra-territorial application of human rights[208].

191. International law, freed from the strictness and reductionism of the inter-State paradigm of the past, is nowadays conceived with due account of the fundamental principle of equality and non-discrimination. The U.N. Human Rights Committee itself, supervisory organ under the U.N. Covenant on Civil and Political Rights, has pronounced on States' automatic succession into human rights treaties (*general comment* n. 26, of 1997, on "continuity of obligations", para. 4) and on extra-territorial application of human rights (*general comment* n. 31, of 2004, on "the nature of the general legal obligation imposed on States Parties", para. 10)[209].

192. There is nowadays a considerable number of international instruments informed by, and conformed on the basis of, the fundamental principle of equality and non-discrimination. It is the case, *inter alia*, of 1965 U.N. Convention on the Elimination of All Forms of Racial Discrimination, of the 1973 U.N. Convention on the Suppression and Punishment of the Crime of *Apartheid*, of the 1979 U.N. Convention on the Elimination of All Forms of Discrimination against Women, of the 1985 Convention against *Apartheid* in Sports, of the 1990 U.N. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, of the 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1958 I.L.O. Convention (n. 111) Concerning Discrimination in Respect of Employment and Occupation, the 1960 UNESCO Convention against Discrimination in Education, to name a few.

193. It goes beyond the scope of the present Separate Opinion to proceed to an examination of these instruments. At this stage, I limit myself to add that, parallel to this impressive law-making work on the basis of the fundamental principle of equality and non-discrimination, this latter has generated in recent decades much doctrinal writing (on pertinent provisions of human rights treaties in force)[210] and an equally impressive jurisprudential construction on the principle at issue. As a result of all that, contemporary international law does not lose sight at all of the fundamental principle of equality and non-discrimination, keeps it in mind all the time and in distinct circumstances, with all the implications of this new posture.

194. Attention has thereby been rightly shifted from unaccountable "sovereign" prerogatives of the past onto people-centered rights and accountability of territorial authorities. And it was about time that human

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[208] As timely recalled by Carsten Stahn, The Law and Practice of International Territorial Administration – Versailles to Iraq and Beyond, Cambridge, University Press, 2008, pp. 112 and 755-756; and cf. pp. 753 and 759, for the U.N. proactive State-building practice developed as from the nineties.

[209] Cf. text in: U.N., International Human Rights Instruments – Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, vol. I, doc. HRI/GEN/1/Rev.9 (vol. I), of 27.05.2008, pp. 223 and 245. - As to State succession, may it be recalled that, a resolution of the Institut de Droit International (of 26.08.2001), though covering State succession in matters of property and debts rather than treaties, nevertheless acknowledged the need "to clarify and improve the situation of individuals" (Article 5(2)), and affirmed, in the preamble, that "all situations leading to a succession of States should take place in full conformity with public international law, and in particular with humanitarian law and human rights". Cf. 69 Annuaire de l'Institut de Droit International - Session de Vancouver (2000-2001) pp. 715 and 717. And, in relation to State succession as well as extra-territorial application of human rights, cf. further, inter alia, comments in: F. Pocar, "Patto Internazionale sui Diritti Civili e Politici ed Estradizione", in Diritti dell'Uomo, Estradizione ed Espulsione (Atti del Convegno di Ferrara di 1999 per Salutare G. Battaglini, ed. F. Salerno), Padova/Milano, Cedam, 2003, pp. 89-90.

[210] Cf., inter alia, e.g., J. Symonides (ed.), The Struggle against Discrimination, Paris, UNESCO, 1996, pp. 3-43; T. Opsahl, Law and Equality - Selected Articles on Human Rights, Oslo, Ad Notam Gyldendal, 1996, pp. 165-206; M. Bossuyt, L'interdiction de la driscrimination dans le Droit international des droits de l'homme, Bruxelles, Bruylant, 1976, pp. 1-240; N. Lerner, Group Rights and Discrimination in International Law, 2nd. ed., The Hague, Nijhoff, 2003, pp. 1-187.

conscience awakened to the imperative of doing so, so as to avoid the repetition of the atrocities of the recent past. The fundamental principle of equality and non-discrimination provides the foundation of an impressive series of human rights treaties (*supra*) which integrate the corpus *juris gentium* of contemporary international law. It is, however, by no means only a contemporary phenomenon, as the secular *principle of equality of treatment* in the relations among individuals as well as among peoples is deeply-rooted in the *droit des gens* (*jus gentium*)[211].

195. Last but not least, on this particular point, I have had the occasion to dwell upon the incidence of the fundamental principle of equality and non-discrimination in a recent decision of this Court. In my Dissenting Opinion in the Court's Order of 06.07.2010 in the case concerning *Jurisdictional Immunities of the State* (original claim and counter-claim, Germany *versus* Italy), I have deemed it fit to observe that

> "(...) As proclaimed, in the aftermath of the II World War, by the 1948 Universal Declaration of Human Rights, `[a]ll human beings are born free and equal in dignity and rights' (Article 1). This prohibition derives from the fundamental principle of equality and non-discrimination. This fundamental principle, according to the Advisory Opinion n. 18 of the Inter-American Court of Human Rights (IACtHR) on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), belongs to the domain of *jus cogens*.
>
> In that transcendental Advisory Opinion of 2003, the IACtHR, in line with the humanist teachings of the `founding fathers' of the *droit des gens* (*jus gentium*), pointed out that, under that fundamental principle, the element of equality can hardly be separated from non-discrimination, and equality is to be guaranteed without discrimination of any kind. This is closely linked to the essential dignity of the human person, ensuing from the unity of the human kind. The basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*[212]. In a Concurring Opinion, it was stressed that the fundamental principle of equality and non-discrimination permeates the whole *corpus juris* of the International Law of Human Rights, has an impact in Public International Law, and projects itself onto general or customary international law itself, and integrates nowadays the expanding material content of *jus cogens*[213]" (paras. 134-135).

4. The Fundamental Principle of Humanity in the Framework of the Law of the United Nations

196. In the present Separate Opinion, I have already pointed out that the experiments of international organizations of mandates, minorities protection, trust territories, and, nowadays, international administration of territory, have not only turned closer attention to the "people" or the "population", to the fulfillment of the

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[211] Cf. Association Internationale Vitoria-Suárez, Vitoria et Suárez: Contribution des théologiens au Droit international moderne, Paris, Pédone, 1939, pp. 38-39.

[212] IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the Juridical Condition and Rights of Undocumented Migrants, Series A, n. 18, paras. 83, 97-99 and 100-101.

[213] *Ibid.*, Concurring Opinion of Judge A.A. Cançado Trindade, paras. 59-64 and 65-73. - In recent years, the IACtHR, together with the ad hoc International Criminal Tribunal for the Former Yugoslavia, have been the contemporary international tribunals which have most contributed, in their case-law, to the conceptual evolution of jus cogens (well beyond the law of treaties), and to the gradual expansion of its material content; cf. A.A. Cançado Trindade, "Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – OAS (2008) pp. 3-29.

needs, and the empowerment, of the inhabitants, but have also fostered - each one in its own way – their access to justice at international level (para. 90, *supra*). Such access to justice is understood *lato sensu*, i.e., as encompassing the *realization of justice*. Those experiments of international organizations (rendered possible by the contemporary expansion of the international legal personality, no longer a monopoly of States) have contributed to the vindication by individuals of their own rights, emanated directly from the *droit des gens*, from the law of nations itself.

197. In my perception, this is one of the basic features of the new *jus gentium* of our times. After all, every human being is an end in himself or herself, and, individually or collectively, is entitled to enjoy freedom of belief and "freedom from fear and want", as proclaimed in the preamble of the Universal Declaration of Human Rights (para. 2). Every human person has the right to respect for his or her dignity, as part of the human kind. The recognition of this fundamental *principle of humanity* is one of the great and irreversible achievements of the *jus gentium* of our times. At the end of this first decade of the XXIst century, the time has come to derive the consequences of the manifest non-compliance with this fundamental principle of humanity.

198. Rights inherent to the human person are endowed with universality (the unity of the human kind) and timelessness, in the sense that, rather than being "conceded" by the public power, they truly precede the formation of the society and of the State. Those rights are independent of any forms of socio-political organization, including the State created by society. The rights inherent to the human person precede, and are superior to, the State. All human beings are to enjoy the rights inherent to them, for belonging to humankind. As a corollary of this, the safeguarding of such rights is not exhausted – it cannot be exhausted – in the action of States. By the same token, States are not to avail themselves of their entitlement to territorial integrity to violate systematically the personal integrity of human beings subject to their respective jurisdictions.

199. States, created by human beings gathered in their social *milieu*, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions. This corresponds to the minimum ethical, universally reckoned by the international community of our times. States are bound to safeguard the integrity of the human person from systematic violence, from discriminatory and arbitrary treatment. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks presence in all cultures, and in the history of human thinking of all peoples[214].

200. This was captured in one of the rare moments, - if not glimpses, - of lucidity in the XXth century (marked by successive atrocities victimizing millions of human beings), namely, that of the proclamation, by the U.N. General Assembly, of the Universal Declaration of Human Rights, on 10 December 1948. In the present Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the ICJ did not even mention, - not even once, - the Universal Declaration of Human Rights; as one of the Members of the Court, I feel, however, obliged to dwell upon it, given the considerable importance that I attribute to the Universal Declaration, in interaction with the United Nations Charter, for the consideration of a subject-matter like the one raised before the Court for the present Advisory Opinion.

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[214]Cf., e.g., [Various Authors,] Universality of Human Rights in a Pluralistic World (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N.P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

201. I feel not only obliged, but likewise entirely free to do so, since, unlike the Advisory Opinion of the Court, in the present Separate Opinion I made a point of filling a void, by not eluding the *cause* of the grave humanitarian crisis in Kosovo, underlying not only the adoption of Security Council resolution 1244(1999), but also the following declaration of independence of Kosovo, one decade later, of 17.02.2008. In fact, it should be kept in mind that the acknowledgement of the principle of respect for human dignity was introduced by the 1948 Universal Declaration, and is at the core of its basic outlook. It firmly asserts: - "All human beings are born free and equal in dignity and rights" (Article 1). And it recalls that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2). The Universal Declaration warns that

> "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble, para. 3);

and it further acknowledges that

> "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (preamble, para. 1).

202. Since the adoption of the Universal Declaration in 1948, one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched, on a truly universal scale. Throughout more than six decades, of remarkable historical projection, the Declaration has gradually acquired an authority which its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a "common standard of achievement" (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations[215].

203. The Universal Declaration is widely recognized as having inspired, and paved the way for, the adoption of more than 70 human rights treaties[216], and as having served as a model for the enactment of numerous human rights norms in national constitutions and legislations, and helped to ground decisions of national and international courts. The Declaration has been incorporated into the domain of customary international law, much contributing to render human rights the common language of humankind.

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[215] Already throughout the travaux préparatoires of the Universal Declaration (particularly in the thirteen months between May 1947 and June 1948), the holistic view of all rights to be proclaimed promptly prevailed. Such outlook was espoused in the official preparatory work of the Declaration, i.e., the debates and drafting in the former U.N. Commission on Human Rights (rapporteur, René Cassin) and subsequently in the Third Committee of the General Assembly. In addition, in 1947, in a contribution to the work then in course in the U.N. Commission on Human Rights, UNESCO undertook an examination of the main theoretical problems raised by the elaboration of the Universal Declaration; it circulated, to some of the most influential thinkers of the time around the world, a questionnaire on the relations between rights of individuals and groups in societies of different kinds and in distinct historical circumstances, as well as the relations between individual freedoms and social or collective responsibilities. For the answers provided, cf. Los Derechos del Hombre - Estudios y Comentarios en torno a la Nueva Declaración Universal Reunidos por la UNESCO, Mexico/Buenos Aires, Fondo de Cultura Económica, 1949, pp. 97-98 (Teilhard de Chardin), 181-185 (Aldous Huxley), 14-22 and 69-74 (Jacques Maritain), 24-27 (E.H. Carr), 129-136 (Quincy Wright), 160-164 (Levi Carneiro), 90-96 (J. Haesaert), 75-87 (H. Laski), 143-159 (B. Tchechko), 169-172 (Chung-Shu Lo), 23 (M.K. Gandhi), 177-180 (S.V. Puntambekar), and 173-176 (H. Kabir). The two U.N. World Conferences on Human Rights (Teheran, 1968; and Vienna, 1993) have given concrete expression to the interdependence of all human rights and to their universality, enriched by cultural diversity.

[216] Applied today on a permanent basis at global (U.N.) and regional levels, and all containing references to it in their preambles.

204. The Universal Declaration, moreover, is today widely recognized as an authoritative interpretation of human rights provisions of the Charter of the United Nations itself, heralding the transformation of the social and international order to secure the enjoyment of the proclaimed rights. In the preamble of the United Nations Charter, "the peoples of the United Nations" express their determination "to save succeeding generations from the scourge of war" (para. 1), and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person" (para. 2). This last assertion is repeated in the 1948 Universal Declaration (para. 5). The U.N. Charter, furthermore, repeatedly calls for universal respect for all, without distinction as to race, sex, language, or religion (Articles 1(3), 13(1)*(b)*, 55*(c)*, and 76*(c)*).

205. Grave breaches of fundamental human rights (such as mass killings, the practice of torture, forced disappearance of persons, ethnic cleansing, systematic discrimination) are in breach of the *corpus juris gentium*, as set forth in the U.N. Charter and the Universal Declaration (which stand above the resolutions of the U.N.'s political organs), and are condemned by the universal juridical conscience. Any State which systematically perpetrates those grave breaches acts criminally, and loses its legitimacy, ceases to be a State for the victimized population, as it thereby incurs into a gross and flagrant reversal of the humane ends of the State.

206. Under contemporary *jus gentium*, no State can revoke the constitutionally-guaranteed autonomy of a "people" or a "population" to start then discriminating, torturing and killing innocent persons, or expelling them from their homes and practicing ethnic cleansing, - without bearing the consequences of its criminal actions or omissions. No State can, after perpetrating such heinous crimes, then invoke or pretend to avail itself of territorial integrity; the fact is that any State that acts this way ceases to behave like a State *vis-à-vis* the victimized population.

207. An international organization of universal vocation and scope of action like the United Nations, created on behalf of the peoples of the world (*supra*), is fully entitled to place under its protection a population that was being systematically discriminated against, and victimized by grave breaches of human rights and international humanitarian law, by war crimes and crimes against humanity. It is fully entitled, in my understanding, to assist that population to become master of its own destiny, and is thereby acting in pursuance of its Charter and the dictates of the universal juridical conscience.

208. In a historical context such as the one under review, the claim to territorial integrity, applicable in *inter-State relations*, is not absolute as some try to make one believe. If one turns to *intra-State* relations, territorial integrity and human integrity go together, with State authority being exercised harmoniously with the condition of the population, aiming to fulfill their needs and aspirations. Territorial integrity, in its *intra-State* dimension, is an entitlement of States which act truly like States, and not like machines of destruction of human

beings, of their lives and of their spirit[217]. By the same token, self-determination is an entitlement of "peoples" or "populations" subjugated in distinct contexts (not only that of decolonization), systematically subjected to discrimination and humiliation, to tyranny and oppression. Such condition of inhumane subjugation goes against the Universal Declaration and the United Nations Charter altogether. It is in breach of the *Law of the United Nations*.

209. Last but not least, the fundamental principle of humanity has been asserted also in the case-law of contemporary international tribunals. In the case of the *Massacre of Plan de Sánchez* (Judgment of 29.04.2004), concerning Guatemala, for example, at a certain stage of the proceedings before the IACtHR, the respondent State accepted its international responsibility for violations of rights guaranteed under the American Convention on Human Rights, and, in particular, for "not guaranteeing the right of the relatives of the (...) victims and members of the community to express their religious, spiritual and cultural beliefs" (para. 36). In my Separate Opinion in that case, I pondered that the primacy of the principle of humanity is identified with the very end or ultimate goal of the Law, of the whole legal order, both domestic and international, in recognizing the inalienability of all rights inherent to the human person (para. 17).

210. That principle marks presence - I added - not only in the International Law of Human Rights, but also in International Humanitarian Law, being applied in all circumstances. Whether it is regarded as underlying the prohibition of inhuman treatment (established by Article 3 common to the four Geneva Conventions on International Humanitarian Law of 1949), or else as by reference to humankind as a whole, or still to qualify a given quality of human behaviour (*humaneness*), the principle of humanity is always and ineluctably present (paras. 18-20). The *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY - Trial Chamber) likewise devoted attention to that principle in its Judgments in, e.g., the cases of *Mucic et alii* (of 20.02.2001) and of *Celebici* (of 16.11.1998). It may further be recalled that the *Martens clause*, which permeates the *corpus juris* of International Humanitarian Law from the times of the I Hague

[217] Already the ancient Greeks were aware of the devastating effects of the indiscriminate use of force and of war over both winners and losers, revealing the great evil of the substitution of the ends by the means: since the times of the Illiad of Homer until today, - as so perspicatiously pondered by Simone Weil, one of the great thinkers of the XXth century, - all "belligerents" are transformed in means, in things, in the senseless struggle for power, incapable even to "subject their actions to their thoughts". The terms "oppressors and oppressed" almost lose meaning, in face of the impotence of everyone in front of the machine of war, converted into a machine of destruction of the spirit and of fabrication of the "inconscience"; S. Weil, Reflexiones sobre las Causas de la Libertad y de la Opresión Social, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131. As in the Illiad of Homer, there are no winners and losers, all are taken by force, possessed by war, degraded by brutalities and massacres; S. Weil, "L'Iliade ou le Poème de la Guerre (1940-1941)" in Oeuvres, Paris, Quarto Gallimard, 1999, pp. 527-552. Homer's perennial message, - as to "the butchery of men" and the "wretched lives" of all those involved in endless fighting (cf. Homer, The Iliad, N.Y./London, Penguin Books, 1991 [reed.], pp. 222 and 543-544, verses 275-281 and 83-89), - is as valid and poignant in his times in ancient Greece as in our days. Along the centuries, the "butchery of men" has continued occurring endlessly (cf., e.g., Bartolomé de Las Casas, Tratados, vol. I, Mexico, Fondo de Cultura Económica, 1997 [reprint], pp. 14-199, and cf. pp. 219, 319 and 419), and lessons do not yet seem to have been sufficiently learned, - in particular the pressing need and duty to secure the primacy of Law over brute force. Thus, already in ancient Rome, M.T. Cicero pondered, in his De Legibus (On the Laws, book II, circa 51-43 b.C.), that there was "nothing more destructive for States, nothing more contrary to right and law, nothing less civil and humane, than the use of violence in public affairs" (M.T. Cicero, On the Commonwealth and On the Laws (ed. J.E.G. Zetzel), Cambridge, University Press, 2003 [reed.], book III, *ibid.*, p. 172). And in his De Republica (circa late 50s-46 b.C.), Cicero added that nothing was "more damaging to a State" and "so contrary to justice and law" than recourse "to force through a measure of violence", where a country had "a settled and established constitution"; M.T. Cicero, The Republic - The Laws, Oxford, University Press, 1998, p. 166 (book III, par. 42). All those warnings sound, centuries later, in our days, quite contemporary...

Peace Conference (1899) to our days, invokes and sustains the continued applicability of the principles of the law of nations, the "principles of humanity" and the "dictates of the public conscience"[218].

211. The same principle of humanity, - I concluded in the aforementioned Separate Opinion in the case of the *Massacre of Plan de Sánchez*, - also has incidence in the domain of International Refugee Law, as disclosed by the facts of the *cas d'espèce*, involving massacres and the State-policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23). Cruelties of the kind occur in different latitudes, in Europe as in the Americas, and in the other regions of the world, - human nature being what it is. The point I wish to make here is that the principle of humanity operates, in my view, in a way to foster the convergences among the three trends of the international protection of the rights inherent to the human person (International Law of Human Rights, International Humanitarian Law and International Refugee Law).

XIV. Towards a Comprehensive Conception of the Incidence of *Jus Cogens*

212. May I now refer back to my brief reflections on the principle *ex injuria jus non oritur* (cf. *supra*, paras. 132-137), in order to address another point touched upon by the present Advisory Opinion of the ICJ on *Accordance with International Law of Kosovo's Declaration of Independence*. As I pointed out therein, in the years preceding the adoption of Security Council resolution 1244(1999) - in the decade 1989-1999 - the United Nations *as a whole* was deeply concerned with all sorts of *injuriae* perpetrated against the population of Kosovo; there were successive grave breaches of human rights and of international humanitarian law, committed by all concerned and coming from all sides, seriously victimizing that population, and aggravating Kosovo's *humanitarian crisis*.

213. Yet, the invocation of the principle *ex injuria jus non oritur* by a couple of participants during the advisory proceedings before the Court referred only, in an atomized way, to one or another of the successive grave breaches committed in that period, and none of them referred to the successive *injuriae* as a whole (cf. *supra*). In paragraph 81 of the present Advisory Opinion, the ICJ has expressed concern with, and has drawn attention to, unlawful use of force, or other egregious violations of international law, in particular of peremptory norms of international law. I fully endorse the Court's concern with violations of *jus cogens*, and I go further than the Court in this respect.

214. The Court's *obiter dictum* appears (in para. 81) at the end of its reasoning addressing specifically one aspect, namely, that of the territorial integrity of States, a basic principle applicable at *inter-State* level. The Court, given the classic features of its own Statute and of its Rules (*interna corporis*), is used to reasoning in the straightjacket of the inter-State dimension. Yet, the incidence of *jus cogens* transcends that dimension. Egregious violations of international law, in particular of peremptory norms of general international law, have most regrettably taken place both at *inter-State* level (e.g., unlawful use of force, such as the 1999 bombings of Kosovo outside the framework of the U.N. Charter, generating many victims), and at *intra-State* level (e.g., the grave violations of human rights and of international humanitarian law perpetrated in Kosovo along the decade of 1989-1999, victimizing its population).

215. As to these latter, in contemporary international law it is clear that the prohibitions of torture, of ethnic cleansing, of summary or extra-legal executions, of forced disappearance of persons, are *absolute* prohibitions, in any circumstances whatsoever: they are prohibitions of *jus cogens*. Breaches (at *intra-State*

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[218] Cf. ICJ, case concerning Jurisdictional Immunities of the State (Order of 06.07.2010, original claim and counter-claim, Germany versus Italy), Dissenting Opinion of Judge Cançado Trindade, paras. 126 and 136-139.

level) of those prohibitions, such as those which occurred in Kosovo during its grave humanitarian crisis, are violations of peremptory norms of general international law (i.e., of *jus cogens*), promptly engaging the responsibility of their perpetrators (States and individuals), with all the juridical consequences ensuing therefrom (which have not yet been sufficiently elaborated by international case-law and legal doctrine to date).

216. By bearing in mind only the inter-State dimension, the Court's aforementioned *obiter dictum* has pursued also an unsatisfactory atomized outlook. The truth is that *jus cogens* has an incidence at both *inter-State* and *intra-State* levels, in the relations between States *inter se*, as well as in the relations between States and all human beings under their respective jurisdictions. We may here behold a *horizontal* (inter-State) and a *vertical* (intra-State) dimensions. This is the comprehensive conception of the incidence of *jus cogens* that, in my understanding, the Court should from now on espouse.

217. In this latter (vertical) dimension, in our times, the State's territorial integrity goes hand in hand with the State's respect of, and guarantee of respect for, the human integrity of all those human beings under its jurisdiction. A State's territory cannot be used by its authorities for the pursuance of criminal policies, in breach of *jus cogens* prohibitions (such as the ones aforementioned). A State's territorial borders cannot be used by its authorities, responsible for grave breaches of human rights or of international humanitarian law, as a shelter or shield to escape from the reach of the law and to enjoy impunity, after having committed atrocities which shocked the conscience of humankind. After all, *hominum causa omne jus constitutum est* (all law is created, ultimately, for the benefit of human beings); this maxim, originated in Roman law, is nowadays common to both the national and the international legal orders (the *jus gentium* of our times).

XV. Final Considerations: Kosovo's Independence with U.N. Supervision

218. In view of the Court's reasoning almost entirely on the basis of Security Council resolution 1244(1999), I feel obliged to make a couple of further points in the present Separate Opinion. First, no one would deny the central position here of Security Council resolution 1244(1999), but the fact is that resolution 1244(1999) is the outcome of a political compromise[219], and, above it and above all resolutions of the Security Council (and of other political organs of the U.N.), lies the *United Nations Charter*. It is the U.N. Charter that is ultimately to guide any reasoning. Secondly, the Court's argument that it "sees no need to pronounce" on other Security Council resolutions adopted "on the question of Kosovo" (as stated in paragraph 86) prior to resolution 1244(1999) (and anyway "recalled" in the preamble of this latter) is, in my view, not well-founded: it simply begs the question.

219. It simply enables the Court to proceed to a "technical" and aseptic examination of Kosovo's declaration of independence of 17.02.2008, making abstraction of the complex and tragic factual background of the *grave humanitarian crisis of Kosovo*, which culminated in the adoption by Security Council of its resolution 1244(1999). While not "pronouncing" on other resolutions of the Security Council (and certainly not of the General Assembly, the importance of which it clearly appears unduly to minimize in paragraph 38), the Court appears at pains when it reckons the need at least to take into account other Security Council

[219] After its adoption, the debate persisted between, on the one hand, those States which laid emphasis on the reference the "territorial integrity" of the F.R. Yugoslavia, found in a preambular paragraph (and Annex 2, para. 8) of resolution 1244(1999), and those States which stressed that that preambular paragraph of the resolution at issue did not create binding obligations and applied only to Kosovo's interim phase, and not to its final status, which was not determined by resolution 1244(1999); cf. A. Tancredi, "Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia", 18 Italian Yearbook of International Law (2008) pp. 55-56. In effect, operative paragraph 11(a) of that resolution expressly referred to the promotion of "the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo".

resolutions (without "pronouncing" on them), prior to resolution 1244(1999), just to illustrate one aspect of the crisis (in paragraph 116), in an incomplete way[220].

220. The result is that the Court has found it sufficient just to refer briefly and *in passim* to the Kosovo crisis[221], without explaining anywhere in the Advisory Opinion what caused that crisis, and what it consisted of; this is exactly what has been addressed in detail by the Security Council resolutions prior to resolution 1244(1999), and by General Assembly resolutions, and by manifestations of other organs of the United Nations. As I do not accompany nor endorse the Court's reasoning, I have felt obliged, as a Member of the Court, to lay down in the present Separate Opinion my own reasoning, which includes a consideration of the reiterated *expressions of grave concern with the humanitarian tragedy in Kosovo* on the part of the Security Council, of the General Assembly, of ECOSOC, of the Secretary General (cf. *supra*), in sum, of the *United Nations as a whole*.

221. To me, the whole factual background should have been treated by the Court with the same zeal and attention to details which prompted it to consider the factual circumstances that surrounded the act of adoption by the Assembly of Kosovo of the declaration of independence. I have concluded, like the Court, that the ICJ has jurisdiction to deliver the Advisory Opinion requested by the General Assembly, that it ought to comply with the General Assembly's request for the Advisory Opinion, and that Kosovo's declaration of independence of 17 February 2008 did not violate international law; but I have so concluded on the basis of my own reasoning, developed in the present Separate Opinion, which is clearly distinct from the Court's reasoning.

222. Another aspect which cannot pass unnoticed here pertains to the recent practice of the Security Council, as reflected in some of its resolutions, of addressing not only States but also non-State entities, and thus going beyond the strict inter-State dimension. The Court briefly refers to it (paragraph 115-117), as well as to the growing need of securing a proper interpretation of resolutions of the Security Council (paragraph 94). Yet, the Court touches on these two points without further elaboration. Without intending to go deeper into this matter, I shall, however, refer here to one additional point, not touched upon by the Court, which in this connection cannot be overlooked.

223. The Security Council's increasing engagement, from the early nineties onwards, in operations not only of peacekeeping, but also of conflict prevention, peacemaking and peacebuilding, has enlarged its horizon as to the exercise of its functions. This is a well-known contemporary phenomenon within the *Law of the United Nations*[222]. In this context, the fact that the Security Council has lately started making demands on, besides States, also non-State entities (including groups of individuals), is not so surprising, after all. What, however, needs to be added - as the Court seems to have missed this point - is that the Security Council also has its "*constitutional framework*": the United Nations Charter. However broad its powers might be, or might have become nowadays, they remain limited by the United Nations Charter itself.

224. The Security Council is not the legislator of the world, but rather one of the main political organs of the United Nations, and the central organ entrusted with the maintenance of international peace and security under the U.N. Charter. For the consideration of the question put to the Court by the General Assembly for the

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[220]Further brief references to those other resolutions of the Security Council are found in paragraphs 91 and 98.

[221]E.g., paragraphs 95, 97, 98 and 116.

[222]Cf., inter alia, e.g., K. Manusama, The United Nations Security Council in the Post-Cold War Era - Applying the Principle of Legality, Leiden, Nijhoff, 2006, pp. 1-320; B.G. Ramcharan, The Security Council and the Protection of Human Rights, The Hague, Nijhoff, 2002, pp. 1-213.

present Advisory Opinion, the *Grundnorm* is not Security Council resolution 1244(1999), but rather the United Nations Charter. And the Charter has placed limits on the action of all its organs, including the Security Council. In the case of Kosovo, the Security Council has acted within those limits, and, by means of its resolution 1244(1999), has placed the grave humanitarian crisis of Kosovo within the framework of the Law of the United Nations. This latter, in turn, has been particularly attentive to the conditions of living of the population, in Kosovo as in distinct parts of the world, so as to preserve international peace and security.

225. There is still a remaining line of considerations that I deem proper to add hereto. At the close of the oral proceedings before this Court relating to the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, in the public sitting of 11 December 2009, I put to the participants the following question:

> "- United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11*(a)*, to 'substantial autonomy and self-government in Kosovo', taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people's eligibility into statehood, in the framework of the legal regime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a `people', and of its eligibility into statehood, under general international law?"

226. Fifteen participants cared to provide their answers to my question: Kosovo[223], Serbia[224], Albania[225], Argentina[226], Austria[227], Burundi[228], Cyprus[229], Finland[230], France[231], The Netherlands[232], Romania[233], Spain[234], United Kingdom[235], United States[236], and Venezuela[237]. After a careful reading of those 15 answers, I am led to extract and select a couple of points, made therein, to which I attach particular importance.

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[223] ICJ doc. 2009/115.

[224] ICJ doc. 2009/111.

[225] ICJ doc. 2009/106.

[226] ICJ doc. 2009/110.

[227] ICJ doc. 2009/116.

[228] ICJ doc. 2009/117.

[229] ICJ doc. 2009/109.

[230] ICJ doc. 2009/107.

[231] ICJ doc. 2009/118.

[232] ICJ doc. 2009/108.

[233] ICJ doc. 2009/112.

[234] ICJ doc. 2009/114.

[235] ICJ doc. 2009/119.

[236] ICJ doc. 2009/113.

[237] ICJ doc. 2009/120.

227. The *renvoi* of Security Council resolution 1244 (1999) to the Rambouillet Accords was meant to create the conditions for substantial autonomy and an extensive form of self-governance in Kosovo[238], in view of the "unique circumstances of Kosovo"[239] (cf. *supra*). In the course of the following decade (1999-2009), the population of Kosovo was able, thanks to resolution 1244 (1999) of the Security Council, to develop its capacity for substantial self-governance, as its declaration of independence by the Kosovar Assembly on 17 February 2008 shows. Declarations of the kind are neither authorized nor prohibited by international law, but their consequences and implications bring international law into the picture.

228. Furthermore, it would not be necessary to indulge into semantics of what constitutes a "people" either. This is a point which has admittedly been defying international legal doctrine to date. In the context of the present subject-matter, it has been pointed out, for example, that terms such as "Kosovo population", "people of Kosovo", "all people in Kosovo", "all inhabitants in Kosovo", appear indistinctly in Security Council resolution 1244 (1999) itself[240]. There is in fact no terminological precision as to what constitutes a "people" in international law[241], despite the large experience on the matter. What is clear to me is that, for its configuration, there is conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people[242]; these are all *factual*, not *legal*, elements, which usually overlap each other[243].

229. It may be recalled that the UNMIK Constitutional Framework for Kosovo (2001) itself (cf. *supra*), clarifying the U.N. approach to matter at issue, pointed out that Kosovo is "an entity" which, "with its people, has unique historical, legal, cultural and linguistic attributes" (para. 1.1)[244]. To these elements I would add yet another one, - and a significant one, - namely, that of *common suffering*: common suffering creates a strong sense of identity. Many centuries ago, Aeschylus (525-*circa* 456 b.C.) had an intuition to that, in his penetrating *Oresteian Trilogy*: he made clear, - in the third choral Ode in *Agamemnon*, and in the culmination of the final procession in *The Eumenides*, - that human beings learn by suffering, and they ultimately learn not simply how to avoid suffering, but how to do right and to achieve justice. Nowadays, in 2010, so many centuries later, I wonder whether Aeschylus was being, perhaps, a bit too confident, but, in any case, I greatly sympathize with his brave message, which I regard as a most valuable and a timeless or perennial one.

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[238]Answers by Kosovo (para. 19), Serbia (para. 3.12), United States (pp. 1 and 4), United Kingdom (para. 11), Argentina (para. 4).

[239]Answer by the United Kingdom (para. 12). – The Rambouillet Conference brought Europe - besides the U.N. itself - into the framework of the Kosovo crisis, in yet another demonstration that the crisis had become a matter of "international concern"; E. Decaux, "La Conférence de Rambouillet – Négotiation de la dernière chance ou contrainte illicite?", in Kosovo and the International Community – A Legal Assessment (ed. C. Tomuschat), The Hague, Kluwer, 2002, pp. 45-64.

[240]In preamble para. 5, operative para. 10, and Annex 2 para. 5; in Annex 2 para. 4, operative para. 10; in Annex 1 principle 4; and in Annex 2 para. 5, respectively; Answer by Spain (para. 20).

[241]It has been argued, for example, that, for a human collectivity or a group to constitute a "people" for eligibility to statehood, it would need: *a)* sharing of common background of ethnicity, language, religion, history and cultural heritage; *b)* territorial integrity of the area claimed; *c)* the subjective element of the group's self-conscious perception as a distinct "people", able to form a viable political entity; for the view that the Kosovars meet these requirements and constitute a "people", and, moreover, their right to internal self-determination was not respected by Milosevic-led Serbia, cf., e.g., M. Sterio, "The Kosovar Declaration of Independence: 'Botching the Balkans' or Respecting International Law?", 37 Georgia Journal of International and Comparative Law (2008-2009) pp. 277 and 287.

[242]Answers by The Netherlands (para. 16), and Albania (paras. 20-21).

[243]Answer by Finland (p. 3).

[244]Cit. in Answer by Austria (p. 2).

230. It is true that U.N. Security Council resolution 1244 (1999) did not determine Kosovo's end-status, nor did it prevent or impede the declaration of independence of 17 February 2008 by Kosovo's Assembly to take place. The U.N. Security Council has not passed any judgment whatsoever on the chain of events that has taken place so far. There remains the U.N. presence in Kosovo, under the umbrella of Security Council resolution 1244 (1999). It has operated in favour of Kosovo's "substantial autonomy" and self-government, and, in the view of some, also of its independence[245].

231. This is not, after all, so surprising, if one keeps in mind the special attention of the contemporary U.N. experiments of international administration of territory to the conditions of living of the population (in the line of the similar concern of the prior experiments of the mandates system under the League of Nations, and of the U.N.'s trusteeship systems – cf. *supra*), disclosing a *humanizing* perspective. The permanence of U.N. presence in Kosovo, also from now on, appears necessary, for the sake of human security, and the preservation of international peace and security in the region.

232. In the other contemporary example of U.N. international administration of territory, that of *East Timor*, even a few years after the completion of the task of UNTAET and the proclamation of independence of East Timor, the U.N. has been keeping a residual presence in the new State of East Timor until now (mid-2010)[246]. Would anyone dare to suggest it should be removed? Hardly so. With all the more reason, in the case of Kosovo, given its factual background, the U.N. presence therein seems to remain quite necessary. Kosovo, as a State *in statu nascendi*, badly needs "supervised independence", as recommended in the *Report* on Kosovo's future (2007) presented by the Special Envoy of the U.N. Secretary General (Mr. M. Ahtisaari).

233. That *Report*, accompanied by the Special Envoy's *Comprehensive Proposal for the Kosovo Status Settlement*, presented in mid-March 2007[247], contains proposals of detailed measures aiming at: *(a)* ensuring the promotion and protection of the rights of communities and their members; *(b)* the effective decentralization of government and public administration (so as to encourage public participation); *(c)* the preservavion and protection of cultural and religious heritage. The ultimate goal is the formation and consolidation of a multi-ethnic democratic society. To that end, Kosovo will have no "official" religion, will promote the voluntary and safe return of refugees and internally displaced persons, will secure *direct applicability* in domestic law of provisions of human rights treaties and international instruments, will secure representation of non-majority communities in its Assembly, will have Albanian and Serbian as official languages, will secure the formation and establishment of an independent Judiciary based upon the rule of law.

234. Furthermore, Kosovo will secure the prevalence of the fundamental principle of equality and non-discrimination, the exercise of the right of participation in public life, and of the right of equal access to justice by everyone. In the framework of all these proposed measures, the safeguard of the rights of the members of the Serb community (as a minority) assumes special importance[248], as well as the promotion of the

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[245]Cf, to this effect, e.g., G. Serra, "The International Civil Administration in Kosovo (...)", op. cit. supra n. (56), pp. 77-78, 81-82 and 87.

[246]By means of its resolution 1704(2006), of 25.08.2006, the Security Council established the new U.N. Integrated Mission in East Timor (UNMIT), whose mandate has ever since been renewed (Security Council resolutions 1802(2008) of 25.02.2008, and 1867(2009) of 26.02.2009); recently, by its resolution 1912 2010) of 26.02.2010, the Security Council has again renewed UNMIT's mandate for one year.

[247]Cf. U.N. docs S/2007/168 and S/2007/168/Add.1.

[248]As the riots of 2004 indicate.

preservation of the cultural and religious heritage[249] of all communities as an integral part of the heritage of Kosovo.

235. In its declaration of independence of 17 February 2008, Kosovo's Assembly expressly accepts the recommendations of the U.N. Special Envoy's *Comprehensive Proposal for the Kosovo Status Settlement*[250], and adds that

> "We declare Kosovo to be a democratic, secular and multi-ethnic Republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo (...)"[251].

In the declaration of independence, Kosovo's Assembly, furthermore, accepts the continued presence of the U.N. in Kosovo, on the basis of Security Council resolution 1244(1999)[252], and expresses its commitment to "act consistent with principles of international law and resolutions of the Security Council", including resolution 1244(1999)[253].

236. The Special Representative of the U.N. Secretary-General continues, in effect, to exercise its functions in Kosovo to date, as the Court recalls in paragraph 92 of the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*; but, contrary to what may be inferred from the Court's brief reference (without any analysis) to the *Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, issued after the declaration of independence by Kosovo's Assembly (period 2008-2010)[254], the situation in Kosovo today is not the same as at the time of its declaration of independence. An examination of the aforementioned *Reports* indicates that Kosovo's situation has undergone changes in the period 2008-2010.

237. Thus, the *Report of the Secretary-General* of 24.11.2008, for example, commented that Kosovo's declaration of independence and its new Constitution posed difficulties and challenges to UNMIK's ability to exercise its administrative authority, but it has never stated that the evolving circumstances represented a violation of resolution 1244(1999) of the Security Council; it has never attempted to "annul" that declaration of independence (para. 21). The Secretary-General admitted making adjustments in UNMIK in the light of the evolving circumstances, rather than opposing these latter, and he added that this would be done by means of a "reconfiguration process" of the international presence in Kosovo (paras. 22-25). He insisted on such UNMIK "reconfiguration" in his *Reports* of 17.03.2009 (paras. 12-14 and 16-17), and of 10.06.2009 (paras. 18-20).

238. In his following *Report*, of 30.09.2009, the Secretary General informed that the "gradual adjustment" and "reconfiguration" of UNMIK had been "successfully concluded" (para. 2), and its role was now that of promotion of security and stability in Kosovo and in the Balkans (para. 3), defusing tensions and

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[249] With the continuous and undisturbed existence and operation of the Serbian Orthodox Church in Kosovo.

[250] Preamble, para. 12; operative part, paras. 1, 3, 4, 5 and 12.

[251] Operative part, para. 2.

[252] Operative part, para. 5.

[253] Operative part, para. 12.

[254] Ever since Kosovo's declaration of independence, six Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo have been issued, and reproduced in the following documents: U.N. doc. S/2008/692, of 24.11.2008, pp. 1-23; U.N. doc. S/2009/149, of 17.03.2009, pp. 1-18; U.N. doc. S/2009/300, of 10.06.2009, pp. 1-17; U.N. doc. S/2009/497, of 30.09.2009, 1-19; U.N. doc. S/2010/169, of 06.04.2010, pp. 1-19; and U.N. doc. S/2010/5, of 05.01.2010, pp. 1-18, respectively.

facilitating practical cooperation with all communities in Kosovo "as well as between the authorities in Pristina and Belgrade" (paras. 3 and 46-47). The same outlook has been pursued in the two most recent *Reports of the Secretary General* (of 2010), which indicate, as areas of priority, those of elections and decentralization, security, rule of law, returns, cultural and religious heritage, community issues, human rights, and Kosovo's representation and engagement in international and regional forums (*Reports* of 05.01.2010, paras. 15-46, and of 06.04.2010, paras. 16-38). In sum, there has been an apparent acceptance by UNMIK of the new situation, after Kosovo's declaration of independence, in view of its successive endeavours to adjust itself to the circumstances on the ground, so as to benefit the population concerned.

239. In conclusion, States exist for human beings and not *vice-versa*. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State. This distortion led States to regard themselves as final repositories of human freedom, and to treat individuals as means rather than as ends in themselves, with all the disastrous consequences which ensued therefrom. The expansion of international legal personality entailed the expansion of international accountability.

240. States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population. Thrown into lawlessness, their victims sought refuge and survival elsewhere, in the *jus gentium*, in the law of nations, and, in our times, in the *Law of the United Nations*. I dare to nourish the hope that the conclusion of the present Advisory Opinion of the International Court of Justice may conform the closing chapter of yet another long episode of the timeless saga of the human kind in search of emancipation from tyranny and systematic oppression.

(Signed) Antônio Augusto CANÇADO TRINDADE.

[Original: English]

SEPARATE OPINION OF JUDGE YUSUF

The Court overly restricted the scope of the question put to it by the General Assembly — Declarations of independence per se are not regulated by international law — It is the claims they express and the processes they trigger that may be of interest to international law — The Court could have used this opportunity to clarify the scope and normative contents of the right to self-determination, in its post-colonial conception — International law disfavours the fragmentation of existing States but also confers certain rights to peoples, groups and individuals including the right of self-determination — The right of self-determination, in its post-colonial conception, is reflected in important acts and conventions — Self-determination is to be exercised mainly inside the boundaries of existing States — International law may support a claim to external self-determination in certain exceptional circumstances — The Court should have assessed whether the specific situation in Kosovo may qualify as exceptional circumstances — Other fora have not shied away from analysing the conditions to be met by claims of external self-determination — The criteria to be considered include the existence of discrimination, persecution, and the denial of autonomous political structures — These acts must be directed against a racially or ethnically distinctive group — A decision by the Security Council to intervene could be an additional criterion — All possible remedies for the realization of internal self-determination must be exhausted before external self-determination can be exercised.

The legislative powers vested in the SRSG are not for the enactment of international legal rules and principles — UNMIK's regulations remain part of a territorially-based legislation enacted solely for the administration of that territory — The Constitutional Framework is not part of international law — A declaration of independence by the PISG could only be considered as ultra vires *in respect of the domestic law of Kosovo.*

I. Introduction

1. Although I am in general agreement with the Court's Opinion and have voted in favour of all the paragraphs of the Operative Clause, I have serious reservations with regard to the Court's reasoning on certain important aspects of the Opinion.

2. First, in interpreting the question put to it by the United Nations General Assembly, the Court states that "[t]he answer to that question turns on whether or not the applicable international law prohibited the declaration of independence" (paragraph 56). This constitutes, in my view, an overly restrictive and narrow reading of the question of the General Assembly. The declaration of independence of Kosovo is the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordance with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which prevailed in that territory. Thus, the restriction of the scope of the question to whether international law prohibited the declaration of independence as such voids it of much of its substance. I will elaborate on these issues in Section II below.

3. My second reservation relates to the inclusion by the Court of the Constitutional Framework established under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) in the category of the applicable international legal instruments under which the legality of the declaration of independence of Kosovo of 17 February 2008 is to be assessed. It is my view that the Constitutional Framework for the Interim Administration of Kosovo is not part of international law. In enacting legislation for the provisional administration of Kosovo, the Special Representative of the Secretary-General (SRSG) may have derived his authority from resolution 1244 of the United Nations Security Council, but he was primarily acting as a surrogate territorial administrator laying down regulations that concerned exclusively the territory of Kosovo and produced legal effects at the domestic level. I will examine these issues further in Section III below.

II. The Scope and Meaning of the Question put to the Court

4. The Court has interpreted the question posed by the General Assembly as not requiring it

> "to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it" (Advisory Opinion, paragraph 56).

Surely, the Court was not asked to pronounce itself on the second point, which is of a general character; but it is regrettable, for the reasons indicated below, that the Court decided not to address the first point, particularly in the sense of assessing the possible existence of a right to self-determination in the specific situation of Kosovo.

5. Firstly, since a declaration of independence is not per se regulated by international law, there is no point assessing its legality, as such, under international law. It is what the declaration of independence implies and the claim it expresses to establish a new State which is of relevance to the law. If such claim meets the conditions prescribed by international law, particularly in situations of decolonization or of peoples subject to alien subjugation, domination and exploitation, the law may encourage it; but if it violates international law, the latter can discourage it or even declare it illegal, as was the case in Southern Rhodesia and Katanga in the 1960s. Secondly, an assessment by the Court of the existence of an entitlement could have brought clarity to the scope and legal content of the right of self-determination, in its post-colonial conception, and its applicability to the specific case of Kosovo. The Court has in the past contributed to a better understanding of the field of application of the right of self-determination with respect to situations of decolonization or alien subjugation and foreign occupation. It could have likewise used this opportunity to define the scope and normative content of the post-colonial right of self-determination, thereby contributing, *inter alia*, to the prevention of the misuse of this important right by groups promoting ethnic and tribal divisions within existing States.

6. Thirdly, claims to separate statehood by ethnic groups or other entities within a State can create situations of armed conflict and may pose a threat not only to regional stability but also to international peace and security. The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimizing such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence. Fourthly, the Court itself admits that "the declaration of independence is an attempt to determine finally the status of Kosovo" (paragraph 114), but fails to examine whether such a unilateral

determination of the final status of Kosovo and its separation from the parent State is in accordance with international law, as clearly implied in the question put to it by the General Assembly.

7. Turning now to the issue of self-determination itself, it should be observed at the outset that international law disfavours the fragmentation of existing States and seeks to protect their boundaries from foreign aggression and intervention. It also promotes stability within the borders of States, although, in view of its growing emphasis on human rights and the welfare of peoples within State borders, it pays close attention to acts involving atrocities, persecution, discrimination and crimes against humanity committed inside a State. To this end, it pierces the veil of sovereignty and confers certain internationally protected rights to peoples, groups and individuals who may be subjected to such acts, and imposes obligations on their own State as well as other States. The right of self-determination, particularly in its post-colonial conception, is one of those rights.

8. It is worth recalling, in this context, that the right of self-determination has neither become a legal notion of mere historical interest nor has it exhausted its role in international law following the end of colonialism. It has indeed acquired renewed significance following its consecration in the two covenants on human rights of 1966, the 1970 Declaration on Friendly Relations (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625, Annex, 25 United Nations GAOR, Supp. (No. 28), United Nations doc. A/5217 at 121 (1970)), the OSCE Helsinki Final Act (the Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975, 14 *I.L.M.* 1292 (Helsinki Declaration), the African Charter on Human and Peoples' Rights and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June 1993, United Nations doc. A/CONF.157/24 (Part I) at 20 (1993)). It is a right which is exercisable continuously, particularly within the framework of a relationship between peoples and their own State.

9. In this post-colonial conception, the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic group live, and thus constitute internal rights of self-determination. They offer a variety of entitlements to the concerned peoples within the borders of the State without threatening its sovereignty.

10. In contrast, claims to external self-determination by such ethnically or racially distinct groups pose a challenge to international law as well as to their own State, and most often to the wider community of States. Surely, there is no general positive right under international law which entitles all ethnically or racially distinct groups within existing States to claim separate statehood, as opposed to the specific right of external self-determination which is recognized by international law in favour of the peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation. Thus, a racially or ethnically distinct group within a State, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State, though this might be the wish of the entire group. The availability of such a general right in international law would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations.

11. This does not, however, mean that international law turns a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of

self-determination (as described above), but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context. Such conditions may be gleaned from various instruments, including the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which, as stated by the Court in paragraph 80 of the Advisory Opinion, reflects customary international law. The Declaration contains, under the principle of equal rights and self-determination of peoples, the following saving clause:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

12. This provision makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty.

13. Admittedly, the Kosovo situation is special in many ways. It is in the context of its distinctive character and history that the question posed by the General Assembly should have been analysed. The violent break-up of Yugoslavia, the removal of the autonomy of Kosovo by the Serbian authorities, the history of ethnic cleansing and crimes against humanity in Kosovo described in the *Milutinović* judgment of the ICTY (*Prosecutor* v. *Milan Milutinović et al., Judgement of 26 February 2009*), and the extended period of United Nations administration of Kosovo which *de facto* separated it from Serbia to protect its population and provide it with institutions of self-government, are specific features that may not be found elsewhere. The Court itself had occasion, in June 1999, to refer to the "human tragedy, the loss of life, and the enormous suffering in Kosovo . . ." (*Legality of Use of Force* (*Yugoslavia* v. *Belgium*), *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 131, para. 16). Given this specific context there was, in my view, sufficient material before the Court to allow it to assess whether the situation in Kosovo reflected the type of exceptional circumstances that may transform an entitlement to internal self-determination into a right to claim separate statehood from the parent State.

14. This question has been considered in other fora. For example, the absence of such exceptional circumstances in the case of *Katanga (DRC)* was described by the African Commission of Human and Peoples' Rights as follows in the *Katangese Peoples' Congress* v. *Zaire*:

> "In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13 (1) of the

> African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire." (*Case 75/92, Katangese Peoples' Congress* v. *Zaire*, p. 1.)

In other words, the Commission held that the Katangese people should exercise their right to self-determination internally unless it could be clearly demonstrated that their human rights were egregiously violated by the Government of Zaire and that they were denied the right to participate in government.

15. Similarly, the Canadian Supreme Court in the *Reference re. Secession of Quebec*, while admitting that there may be a right to external self-determination where a people is denied any meaningful exercise of its right to self-determination internally, concluded as follows:

> "A State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity recognized by other States. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development." (*Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada*, ([1998] 2 *S.C.R.* 217; 161 *D.L.R.* (4th) 385; 115 *Int. Law Reps.* 536), para. 154).

16. To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government. A decision by the Security Council to intervene could also be an additional criterion for assessing the exceptional circumstances which might confer legitimacy on demands for external self-determination by a people denied the exercise of its right to internal self-determination. Nevertheless, even where such exceptional circumstances exist, it does not necessarily follow that the concerned people has an automatic right to separate statehood. All possible remedies for the realization of internal self-determination must be exhausted before the issue is removed from the domestic jurisdiction of the State which had hitherto exercised sovereignty over the territory inhabited by the people making the claim. In this context, the role of the international community, and in particular of the Security Council and the General Assembly, is of paramount importance.

17. In the specific case of Kosovo, the General Assembly has sought the advisory opinion of the Court to shed light on the accordance of the declaration of independence with international law which implied, in my view, the need for an assessment of whether the special situation of this territory, in view of its history and of the recent events that led to the United Nations interim administration and to its declaration of independence, could possibly entitle its people to a claim for separate statehood without the consent of its parent State. The Court had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It has unfortunately failed to seize this opportunity, which would have allowed it to clarify the scope and normative content of the right to external self-determination, in its post-colonial conception, and thus to contribute, *inter alia*, to the prevention of unjustified claims to independence which may lead to instability and conflict in various parts of the world.

III. The Legal Nature of UNMIK Regulations

18. In paragraph 88 of the Advisory Opinion, the Court observes that: "[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character". This statement confuses the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves. International administrations have to act in a dual capacity when exercising regulatory authority. Although they act under the authority of international institutions such as the United Nations, the regulations they adopt belong to the domestic legal order of the territory under international administration. The legislative powers vested in the SRSG in Kosovo under resolution 1244 are not for the enactment of international legal rules and principles, but to legislate for Kosovo and establish laws and regulations which are exclusively applicable at the domestic level. The fact that the exercise of legislative functions by the SRSG may be subject to the control of international law, or that they may have been derived from the authority conferred upon him by a resolution of the Security Council does not qualify these regulations as rules of international law for the purposes of the question put to the Court by the General Assembly.

19. The Constitutional Framework enacted by the SRSG operated as the Constitution of the Provisional Institutions of Self-Government of Kosovo (PISG) and was part of the internal laws of Kosovo which, as specifically provided in UNMIK regulation 1999/24, consisted of: "*(a)* the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments thereunder; and *(b)* the law in force in Kosovo on 22 March 1989". There are no differences in the legal effects or binding force of the laws existing in Kosovo, irrespective of whether they were issued by UNMIK or by Yugoslavia/Serbia before 1989. The Constitutional Framework as well as all other regulations enacted by the SRSG are part of a domestic legal system established on the basis of authority derived from an international legal source. The existence of this authority does not however qualify them as part of international law. Rather, they belong to the legal system which governs Kosovo during the interim period and beyond. They are part of a territorially-based legislation which was enacted solely and exclusively for the administration of that territory. This is made clear by the interface with pre-existing Yugoslav/Serbian legislation enacted before 1989 which is also still in force in Kosovo.

20. The question put to the Court by the General Assembly concerns the accordance of the declaration of independence of Kosovo with international law. The Constitutional Framework enacted by the SRSG is not part of international law. Even if the declaration of independence was adopted by the PISG in violation of the Constitutional Framework, such action could only be considered as *ultra vires* in respect of the domestic law of Kosovo, and would have to be dealt with by the SRSG, in his quality as administrator of the territory, or by the Supreme Court of Kosovo. Thus, there was no need for the Court to state that the "authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the Interim administration (paragraph 109). It is also a very unpersuasive argument.

21. The question on which the General Assembly requested the Advisory Opinion explicitly referred to the "Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo". Moreover, the Court was not requested to give an advisory opinion on the compatibility of the declaration of independence with the Constitutional Framework which, in my view, is not part of international law, and should not have therefore been taken into account in assessing the accordance of the declaration of independence of Kosovo with international law.

(Signed) Abdulqawi A. YUSUF.